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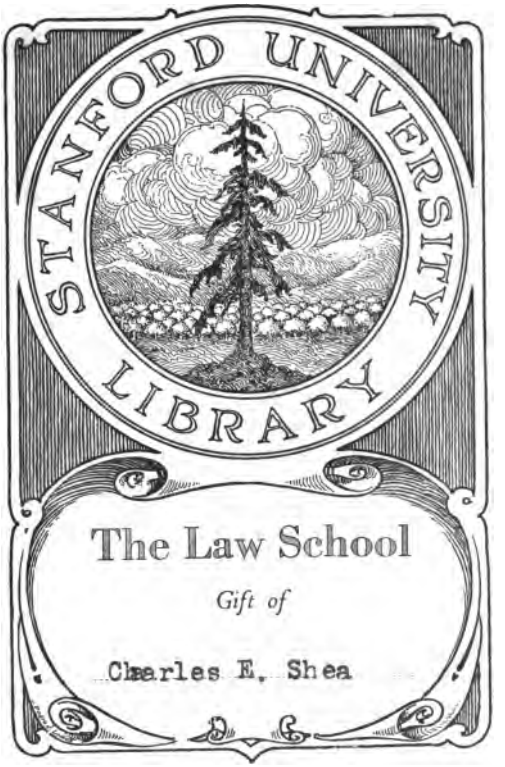

CRIMINAL PLEADING AND PRACTICE

A TREATISE

ON

CRIMINAL PLEADING

AND

PRACTICE

BY

JOSEPH HENRY BEALE, JR.
PROFESSOR OF LAW IN HARVARD UNIVERSITY.

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PREFACE.

A TREATISE on procedure must be needlessly large, or it must omit many details of merely local practice. These details are of use to no one; for every lawyer must learn from the reports of his own State, from books of local practice, and particularly from actual experience in court, the peculiarities of local procedure. He consults a general treatise merely for those fundamental principles of practice which are the same wherever our system of law prevails. It happens, therefore, that a treatise on procedure can be prepared which shall be at the same time a sufficient guide to practice, and a statement of general principles adapted to the purposes of the student. It has been my aim to write such a treatise on Criminal Pleading and Practice. Though the book was planned chiefly for the use of the student, the lawyer ought, I trust, to find in it all he will need outside his local manuals.

In citing authorities, I have tried to bear in mind three points: not to multiply authorities on a single proposition, especially one that is well-settled and elementary; not to overload the text and obscure the thought by a multitude of mere examples; and not to narrow the range of citations to a few jurisdictions, and thus give the appearance, at least, of a

merely local treatment of the subject. The authorities have been drawn from England, from the Federal courts, and from every State and Territory of the Union; though the great majority of them are of course from the ten or twelve important States whose jurisprudence has determined that of the whole country. The older leading cases have been cited; but the later decisions, representing more accurately the existing practice, have been referred to more often. Little attempt has been made to cite statutes, with two exceptions: the New York Code of Criminal Procedure has been constantly used, as the type of the code practice in a large number of States; and the Massachusetts Criminal Pleading Act of 1899 has been referred to, as the most radical and consistent attempt to simplify criminal pleadings.

The subject of Criminal Pleading has been treated with rather more fulness than the other subjects of procedure, and a few indictments have been dealt with in detail. For this treatment the indictments for homicide, forgery, perjury, embezzlement, and obtaining by false pretences have been selected. They are on the whole the most difficult of indictments, and present all the problems that ordinarily arise in pleading.

To the student who uses this book, not as a help in review, but in order to acquire his first knowledge of this branch of the law, no better advice can be given than carefully to study in connection with the text as many of the authorities referred to as are accessible to him.

CAMBRIDGE, October 1, 1899.

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CRIMINAL PLEADING AND PRACTICE.

PART I.

MATTERS BEFORE TRIAL.

CHAPTER I.

JURISDICTION AND VENUE.

§ 1. In order that crime may be punished through judicial proceedings it is necessary, first, that the country itself should have jurisdiction over the crime, that is, the right to deal with it judicially; secondly, that proceedings should be instituted in a court designated and empowered to deal with the crime; thirdly, that they should be instituted in the proper place, or (in the ordinary phrase) that the venue should be correctly laid.

§ 2. **No one can be punished for a crime unless at the time of committing the offence he was subject to the jurisdiction of the State in which he is prosecuted.** Crimes can ordinarily be punished only when committed within the territory of the prosecuting State.[1]

[1] S. *v.* Hall, 114 N. C. 909, 19 S. E. 602; P. *v.* Merrill, 2 Park. 590. The territorial jurisdiction may be extended three miles from shore over the high seas, or over partially landlocked bays. C. *v.* Manchester, 152 Mass. 230, 25 N. E. 113; Manchester *v.* Massachusetts, 139 U. S. 240.

The jurisdiction of a country also extends over all vessels registered in its ports, and flying its flag. A crime committed on a vessel is therefore punishable by the country whose flag it flies,[1] even if the vessel is at the time within the territory of another country. The latter country also has jurisdiction to punish the crime, and this conflict of jurisdiction is ordinarily regulated by treaty.[2]

The fact that the crime harms a State or its citizen is not enough to give the State jurisdiction where the fact occurred in another country.[3] So where a victim is struck outside the State and dies within it from the blow, the State cannot punish the act of killing, that is, the infliction of the fatal blow.[4] And if a man is married to a second wife (his first wife living) outside a State, and cohabits within it, that State cannot punish him for bigamy.[5]

Since a sovereign has jurisdiction everywhere over his own subjects, he may punish his subject for an act done in a foreign country. This punishment, however, must be imposed by statute; in the absence

[1] R. *v.* Armstrong, 13 Cox C. C. 184.

[2] R. *v.* Anderson, 11 Cox C. C. 198; Wildenhus's case, 120 U. S. 1.

[3] S. *v.* Carter, 3 Dutch. 499; S. *v.* Kelly, 76 Me. 331. *Contra*, Hanks *v.* S., 13 Tex. App. 289.

[4] R. *v.* Lewis, Dears. & Bell C. C. 182, 7 Cox C. C. 277, 26 L. J. M. 104; S. *v.* Carter, 3 Dutch. 499; S. *v.* Kelly, 76 Me. 331. In some States, however, a statute punishing the wrongdoer in the place where death occurred is upheld, on the ground that the offence thus dealt with is not the blow, but the consequential hurt which develops within the jurisdiction and there causes the death. C. *v.* Macloon, 101 Mass. 1; *Ex parte* McNeely, 36 W. Va. 84, 14 S. E. 436.

[5] S. *v.* Cutshall, 110 N. C. 538, 15 S. E. 261; *Re* Watson, 19 R. I. 342, 33 Atl. 873. But a statute may make the act of cohabiting a crime. C. *v.* Bradley, 2 Cush. 553.

of an express statute acts are punished only if they took place within the jurisdiction.

§ 3. **Only a court empowered by the sovereign can deal with a charge of crime.** Where the court has not jurisdiction conferred upon it by law, the consent of the defendant to be tried will not give legal efficacy to the proceedings.[1] But if the court has jurisdiction, the fact that the defendant was illegally arrested, or even that he was illegally brought within the jurisdiction, does not affect its legal power to deal with him.[2]

§ 4. **Offences must generally be prosecuted in the county where the fact is committed:**[3] this county is called the *venue* of the crime. It is required in the constitutions of most States that a crime shall be prosecuted in the neighborhood of the place of commission, or in the county.[4] Where the offence was committed outside the territory of the State, venue must be arbitrarily fixed; in case of a crime committed on the high seas or on territory outside the United States, it is in this country provided that proceedings shall be instituted in the district into which the offender is first brought.[5]

§ 5. **The offence is committed where the legal injury is inflicted, not where a particular result follows.** In case

[1] C. *v.* Maloney, 145 Mass. 205, 13 N. E. 482; P. *v.* Granice, 50 Cal. 447.

[2] *Ex parte* Scott, 9 B. & C. 446; Mahon *v.* Justice, 127 U. S. 700. See *infra*, § 37.

[3] 4 Bl. Com. 305; C. *v.* Call, 21 Pick. 509; S. *v.* Smiley, 98 Mo. 605, 12 S. W. 247. If the county is divided after the commission of an offence, it must be prosecuted in the new county within which the place of the offence now lies. S. *v.* Jones, 4 Halst. 357, 373; S. *v.* Kring, 74 Mo. 612.

[4] See for instance Const. U. S. Amend. VI; Mass. Decl. Rights, Art. XIII.

[5] U. S. Rev. Stat. § 730; Jones *v.* U. S., 137 U. S. 202.

of homicide, the venue is where the fatal blow is struck, not where the victim dies;[1] and not where the wrongdoer sets the fatal violence in motion. Therefore if a shot is fired, or poison is sent, from one place, and the victim is hit or takes the poison in another place, the venue of the crime is where the victim received the injury.[2] And where a wrongdoer in one place is present aiding and abetting the act of murder which is done across a boundary line in another place, the place of his crime is the latter place.[3]

In prosecutions for larceny, where the goods were taken in one county and were carried by the thief into another, the venue may be laid in either county.[4] By

[1] S. *v.* Gessert, 21 Minn. 369; U. S. *v.* Guiteau, 1 Mack. 498; Stout *v.* S., 76 Md. 317, 25 Atl. 299. It was anciently deemed doubtful whether a murder could be punished in either place, if the blow was given in one county and the death occurred in another. 4 Bl. Com. 303. The difficulty was due to a peculiarity of procedure that has long since passed away; namely, the fact that the jurors must be persons with knowledge of the facts. Thayer, Prelim. Tr. Evid. 90, 93. Probably the homicide could have been punished in either county. Y. B. 4 H. 7, 8, pl. 10; 7 H. 7, 8, pl. 1. A statute of 2 & 3 Ed. 6, c. 24, provided that in such a case the prosecution might take place where the victim died. This has been re-enacted in several States, and is not unconstitutional. C. *v.* Parker, 2 Pick. 550; Hauk *v.* S., 148 Ind. 238, 46 N. E. 127. The effect of the statute is to allow prosecution in either county.

[2] U. S. *v.* Davis, 2 Sumn. 482; S. *v.* Hall, 114 N. C. 909, 19 S. E. 602; Simpson *v.* S., 92 Ga. 41, 17 S. E. 984; S. *v.* Morrow, 40 S. C. 221, 18 S. E. 853.

[3] Hatfield *v.* C. (Ky.), 12 S. W. 309.

[4] S. *v.* Williams (Mo.), 47 S. W. 891; Hurlbut *v.* S., 52 Neb. 428, 72 N. W. 471. This rule applies to acts made larceny by statute, C. *v.* Rand, 7 Met. 475; and to embezzlement, R. *v.* Rogers, 3 Q. B. D. 28. It does not apply to receiving stolen property, which can be punished only where the property is first received. Allison *v.* C., 83 Ky. 254 (*contra* in Texas by statute: Moseley *v.* S., 36 Tex. Cr. R. 578, 38 S. W. 197). This rule was the result of the old form of procedure

a questionable extension of this rule, it has been held in some States that where goods have been stolen in one State and brought into another by the thief, the offence may be prosecuted in the latter State;[1] but in other States, more correctly, it has been held that the larceny is not punishable in the second State.[2] A statute, however, providing for the punishment of a thief who having stolen property in one State has brought it into another has always been held constitutional.[3]

Where an offence consists of an act done with a certain intent, or by a certain means, the place of the offence is the place of the act, not the place where the intent was formed or where the means were employed. Thus where the defendant gave poison to his victim in one place, and wrongly thinking her dead brought her into another place and there cut off her head, he was held to have committed murder in the latter place, though he had felt malice against her as a human being only in the former.[4] So where the defendant used false pretences in one place and thereby obtained property in another place he was held to have obtained the property by false pretences in the latter place.[5]

One who acts through an innocent agent is guilty

by following the property stolen and vouching the possessor to warranty. 2 Pol. & Mait. Hist. Eng. Law 158; Y. B. 4 H. 7, 5, pl. 1.

[1] C. *v.* Holder, 9 Gray 7; Stinson *v.* P. 43 Ill. 397. This is usually not allowed where the taking was not in one of the United States. C. *v.* Uprichard, 3 Gray 434; but see S. *v.* Bartlett, 11 Vt. 650. It extends to embezzlement. C. *v.* Parker, 165 Mass. 526, 43 N. E. 499.

[2] Strouther *v.* C., 92 Va. 789, 22 S. E. 852; Stanley *v.* S., 24 Oh. S. 166; Lee *v.* S., 64 Ga. 203.

[3] S. *v.* Matthews, 87 Tenn. 689, 11 S. W. 793.

[4] Jackson *v.* C., 100 Ky. 239, 38 S. W. 1091.

[5] R. *v.* Ellis, [1899] 1 Q. B. 230.

where the agent acts; thus where a crime is committed by sending a letter through the mail, the sender commits a crime where the letter is received.[1] If the offence is accomplished by an accomplice, under such circumstances as to make the accused a principal (as for instance if the offence is a misdemeanor, where all guilty parties are principals), the accused is guilty where the fact occurred.[2] Thus in indicting one for conspiracy the venue may be laid where any overt act in pursuance of the conspiracy was done.[3] But an accessory in felony, whose accessorial acts have been done in one place while the crime was accomplished in another, must be prosecuted, if at all, where he himself acted.[4]

§ 6. **Venue is often regulated by statute.** Thus it is provided in many States that when an offence is committed within a certain distance of the boundary line of two counties it may be prosecuted in either county.[5] The venue alleged in the indictment may be the actual place, with an averment that it is within the specified distance of the boundary,[6] or the crime

[1] Lindsey *v.* S., 38 Oh. S. 507; P. *v.* Adams, 3 Den. 190, 1 N. Y. 173; C. *v.* Blanding, 3 Pick. 304. There is authority for holding in cases where the sending or the publication of a letter is criminal that the venue may be either at the place of mailing or at the place of receipt. R. *v.* Burdett, 4 B. & Ald. 95; *In re* Palliser, 136 U. S. 257.

[2] C. *v.* Gillespie, 7 S. & R. 469.

[3] P. *v.* Arnold, 46 Mich. 268; Amer. Fire Ins. Co. *v.* S., 75 Miss. 24, 22 So. 99.

[4] S. *v.* Wyckoff, 31 N. J. L. 65; S. *v.* Moore, 26 N. H. 448.

[5] This statute is usually held constitutional. C. *v.* Gillon, 2 All. 502; P. *v.* Hubbard, 86 Mich. 440, 49 N. W. 265; S. *v.* Stewart, 60 Wis. 587. It is however unconstitutional in a few States. Buckrice *v.* P., 110 Ill. 29.

[6] P. *v.* Davis, 56 N. Y. 95.

may be alleged to have been committed in the county in which the prosecution is instituted.[1]

When an offence is committed in a moving vehicle like a vessel or a railway car, and it is uncertain in what county it actually took place, prosecution is often allowed by statute in any county into which the vehicle has come with the wrongdoer.[2]

§ 7. **The privilege of change of venue, for local prejudice or sometimes for other reasons, is frequently given by statute.** The question whether a proper case for change of venue is made out is to be determined by the trial court; and its decision cannot be reviewed by a higher court unless there is a plain abuse of discretion.[3] The trial court should not act except in a clear case.[4] If a change of venue is refused, in a case where to refuse it is an evident abuse of discretion, the action will be reviewed in the higher court and a new trial granted.[5]

Where the constitution secures the right to be tried in the vicinity of the crime, a change of venue can take place only at request of the defendant, or at least

[1] S. *v.* Pugsley, 75 Ia. 742; S. *v.* Masteller, 45 Minn. 128. If the town is named, it should be the town nearest to the actual place. C. *v.* Matthews, 167 Mass. 163, 45 N. E. 92.

[2] Watt *v.* P., 126 Ill. 9, 18 N. E. 340; P. *v.* Hulse, 3 Hill 309; Powell *v.* S., 52 Wis. 217.

[3] Hawes *v.* S., 88 Ala. 37, 7 So. 302; P. *v.* Congleton, 44 Cal. 92; Walker *v.* S., 136 Ind. 663, 36 N. E. 356; S. *v.* Foster, 91 Ia. 164, 59 N. W. 8; C. *v.* Buccieri, 153 Pa. 535, 26 Atl. 228. In Missouri the court has no discretion; the change must be granted upon the filing of a sufficient affidavit. S. *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

[4] S. *v.* Weems, 96 Ia. 426, 65 N. W. 387; P. *v.* Vermilyea, 7 Cow. 108, 137.

[5] S. *v.* Crafton, 89 Ia. 109, 56 N. W. 257; S. *v.* Yellow Hair (Mont.), 55 Pac. 1026.

with his consent, clearly expressed;[1] but where there is no constitutional objection, it may be granted upon application of the prosecuting attorney.[2] The facts on account of which the application is made must be shown by affidavits,[3] which may be contradicted by counter affidavits, or disproved by the actual impanelling of an impartial jury.[4]

Change of venue may usually be had because of prejudice or interest of the judge. The obvious impropriety of giving a judge discretion to determine on the facts the question of his own competence has led to the rule in most States that change of venue for prejudice of the judge must be granted as a matter of course upon the filing of proper affidavits.[5]

[1] S. *v.* Kindig, 55 Kan. 113, 39 Pac. 1028; Lester *v.* S., 91 Wis. 249, 64 N. W. 850.

[2] P. *v.* Peterson, 93 Mich. 27, 52 N. W. 1039; P. *v.* Webb, 1 Hill 179.

[3] Hager *v.* Falk, 82 Wis. 644, 52 N. W. 432.

[4] S. *v.* Causey, 43 La. Ann. 897, 9 So. 900.

[5] Cantwell *v.* P., 138 Ill. 602, 28 N. E. 964; Manly *v.* S., 52 Ind. 215; S. *v.* Shaw, 43 Oh. S. 324. In a few States, however, it is held that the judge must decide. S. *v.* Billings, 77 Ia. 417, 42 N. W. 456; Emporia *v.* Volmer, 12 Kan. 622.

CHAPTER II.

METHODS OF PROSECUTION.

§ 8. THERE are three possible methods of instituting a prosecution for crime: the first, upon the unsworn complaint of an individual; the second, upon the complaint of an official appointed to institute prosecutions; the third, upon a sworn complaint. The first method was the rule in the earliest period of the English law, and continued as a legal method, under the name *appeal*, until 1818; it has been practically obsolete, however, for several centuries. The second method is that adopted in some European countries. The third method is the only one in use in the United States, where every prosecution must be founded on an accusation verified by oath.[1]

The object of requiring the prosecution to be upon oath is to protect innocent men against frivolous and ill-considered charges of crime. In order that this object may be accomplished, it is obvious that the person who makes the sworn statement should have knowledge of the facts to which he swears, either at first hand or as the result of investigation. An oath taken upon the vague ground called "information and belief" should not be enough foundation

[1] Swiney *v.* S., 119 Ind. 478, 21 N. E. 1102; S. *v.* Spencer, 43 Kan. 119, 23 Pac. 159.

for a prosecution for crime,[1] though this rule is relaxed in some cases where no formal prosecution can begin until after a judicial investigation.[2] The person who institutes a prosecution is not technically a party to it, and his death does not abate the proceedings.[3]

If the charge is made upon the oath of an individual, the prosecution is called a complaint; if upon the oath of an official prosecuting attorney, it is called an information; if upon the oath of a grand jury, it is called an indictment or a presentment. No matter what preliminary steps may have been taken, the prosecution does not formally begin until the filing in court of the charge of crime, properly verified by oath.[4]

§ 9. **Every citizen has the right to institute a prosecution by a complaint, verified by his oath, lodged with the proper court or magistrate.**[5] This complaint must substantially charge a crime, though it need not necessarily (unless it is to form the only statement of the crime) possess the formality of an indictment.[6] Upon receiving the complaint, it is in most States the duty of the judge or magistrate to satisfy himself, before proceeding further, that there is reasonable cause for the complaint; and for this purpose he may delay a sufficient time;[7] though he may be satisfied

[1] *Ex parte* Smith, 3 McLean 121; *Ex parte* Spears, 88 Cal. 640, 26 Pac. 609; Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635.

[2] S. *v.* Ladenberger, 44 Kan. 261, 24 Pac. 348.

[3] S. *v.* Loftis, 3 Head 500.

[4] Post *v.* U. S., 161 U. S. 583.

[5] C. *v.* Murphy, 147 Mass. 525, 18 N. E. 418; Stuart *v.* P., 42 Mich. 255, 3 N. W. 863.

[6] S. *v.* Smith, 57 Kan. 673, 47 Pac. 541.

[7] S. *v.* Keyes, 75 Wis. 288, 44 N. W. 13.

to accept the oath of the complainant without further testimony.[1] If he finds no reason for disbelieving the complaint, he is bound to proceed with the case, and if he refuses to do so may be compelled by a writ of mandamus.[2] The next step is to procure the presence of the person accused, which is usually done by issuing a warrant to an officer to arrest the accused and bring him before the court; though in the case of small offences there is in some States a provision by which the court may summon the accused to appear at a certain time, without ordering his arrest.

The defendant having come or been brought before the court, if the offence is one which the court has power to deal with it will usually proceed to try the case. If the offence is one of which both the court to which complaint is made and a higher court have jurisdiction, the former may at its option dispose of the case, or hold the accused for trial in the higher court.[3] If the offence is beyond the jurisdiction of the court, it can do no more than order the accused detained for the higher court.

§ 10. **The attorney general or other proper prosecuting officer may, if permitted by law, file in the proper court an information for crime, verified by his oath.** A private person cannot file an information.[4] Prosecution upon information, without accusation of a grand jury, is not unconstitutional.[5] Unless there is some special constitutional or statutory provision, the prosecuting

[1] S. *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321.

[2] S. *v.* Lauver, 26 Neb. 757, 42 N. W. 762.

[3] C. *v.* Sullivan, 156 Mass. 487, 31 N. E. 647.

[4] S. *v.* Severine, 2 S. D. 238, 49 N. W. 1056.

[5] Hurtado *v.* California, 110 U. S. 516. In Massachusetts alone it has been held unconstitutional to prosecute felonies without indictment,

officer may file an information at pleasure; it is common, however, to put some check on this power, as, for instance, the requirement that leave of court be obtained.[1]

The commonest form of criminal procedure in several States is the information filed after a preliminary examination.[2] The accused having been arrested upon complaint to a magistrate is examined by him; and if probable cause is found for believing the accused guilty, he is committed, and the prosecuting officer files an information charging the crime of which the magistrate found him probably guilty. The complaint and preliminary examination are essential to the legality of the information.[3] The party accused may, however, waive this right, and he is held to do so if he pleads to the information without objecting to its regularity; having once pleaded to it, he cannot afterwards attack it because the complaint was irregular, or because there was no examination.[4]

The information must be for the same fact investigated at the examination. The prosecuting attorney

Jones *v.* Robbins, 8 Gray 329; but misdemeanors may be punished on information, C. *v.* Waterborough, 5 Mass. 257.

[1] Holt *v.* P., 23 Col. 1, 45 Pac. 374; S. *v.* Brett, 16 Mont. 360, 40 Pac. 873.

[2] In Arkansas an information may be based on an examination by a coroner. *Ex parte* Anderson, 55 Ark. 527, 18 S. W. 856.

[3] O'Hara *v.* P., 41 Mich. 623, 3 N. W. 161; Domingues *v.* S., 37 Tex. Cr. R. 425, 35 S. W. 973; Wilson *v.* C., 87 Va. 94, 12 S. E. 108.

[4] Brown *v.* P., 20 Col. 161, 36 Pac. 1040; Cunningham *v.* S., 116 Ind. 433, 17 N. E. 904; P. *v.* Williams, 93 Mich. 623, 53 N. W. 779; Johnson *v.* S., 53 Neb. 103, 73 N. W. 463; Ryan *v.* S., 83 Wis. 486, 53 N. W. 886.

Contra in California. Kalloch *v.* Superior Court, 56 Cal. 229; and see White *v.* S., 28 Neb. 341, 44 N. W. 443.

cannot add a new charge;[1] nor can he so change the description of the facts as to describe a different act, as by altering the name of the person injured,[2] or in an indictment for perjury alleging testimony at a different date.[3] But he may cover part only of the facts investigated, as by informing against one only of two persons jointly held.[4] And the very fact investigated may be charged in more correct legal form, even to the extent of stating what purports to be a different crime.[5] That the fact charged in the information is the same as that investigated may be proved by parol evidence.[6] The magistrate must, however, hold the accused upon some definite charge.[7]

Where the accused is a fugitive from justice, the information may be filed without a preliminary examination.[8]

The information and the indictment being concurrent methods of procedure, the former may be adopted even while the grand jury is in session, so that an indictment might easily be had;[9] and, indeed, an information may be filed though an indictment is already pending.[10] But when the grand jury has passed upon and ignored the charge, the accused is entitled to the protection which the action of the

[1] S. *v.* Jarrett, 46 Kan. 754, 27 Pac. 146.

[2] P. *v.* Wallace, 94 Cal. 497, 29 Pac. 950.

[3] Brown *v.* S., 91 Wis. 245, 64 N. W. 749.

[4] Haunstine *v.* S., 31 Neb. 112, 47 N. W. 698.

[5] *Ex parte* Nicholas, 91 Cal. 640, 28 Pac. 47; S. *v.* Spaulding, 24 Kan. 4; S. *v.* Myers, 8 Wash. 177, 35 Pac. 580.

[6] S. *v.* Maxwell, 51 Ia. 314, 1 N. W. 666; C. *v.* Dillane, 11 Gray 67.

[7] Yaner *v.* P., 34 Mich. 286.

[8] S. *v.* Woods, 49 Kan. 237, 30 Pac. 520.

[9] P. *v.* Ebanks, 120 Cal. 626, 52 Pac. 1078.

[10] S. *v.* Stewart, 47 La. Ann. 410, 16 So. 945.

jury gives him; and no information can be brought against him at the same term.[1]

§ 11. **The common method of prosecuting crime is indictment by the grand jury.**[2] This method is required by some constitutions.[3] The grand jury may act on any matter brought before it; there is no need of a preliminary examination.[4]

When the grand jury calls a crime to the attention of the court of its own motion, no bill having been first presented to it by a prosecuting officer, its finding is called a *presentment*. When the grand jury makes a presentment the prosecuting attorney (in the United States) draws a formal accusation.

§ 12. **Two persons may be prosecuted jointly for any crime that may be committed jointly.** Such an indictment is "joint and several," that is, either party may be separately tried or separately convicted.[5] If one party is tried alone, he may be convicted upon evidence that he alone committed the offence;[6] and if the parties are tried together, the acquittal of one will not prevent the conviction of another.[7]

Both parties may be convicted, or one may be convicted of the entire crime charged and one of an inferior degree[8] or of a part of the offence, as, for

[1] S. *v.* Boswell, 104 Ind. 541, 4 N. E. 675; S. *v.* Cain, 16 Mont. 561, 41 Pac. 709.

[2] See *infra*, Chap. VI.

[3] See Const. U. S. Amend. V.

[4] U. S. *v.* Kilpatrick, 16 Fed. 765; Osborn *v.* C. (Ky.), 20 S. W. 223; S. *v.* Bowman, 43 S. C. 108, 20 S. E. 1010; and see S. *v.* Wise, 83 Ia. 596, 50 N. W. 59. *Contra*, Butler *v.* C., 81 Va. 159.

[5] C. *v.* Griffin, 3 Cush. 523; S. *v.* O'Brien, 18 R. I. 105, 25 Atl. 910. See Bucklin *v.* U. S., 159 U. S. 682.

[6] P. *v.* Cotto, 131 N. Y. 577, 29 N. E. 1008.

[7] Funderbunk *v.* S., 75 Miss. 20, 21 So. 658.

[8] S. *v.* Lee, 91 Ia. 499, 60 N. W. 119.

instance, on an indictment for burglary one of the burglary and one of larceny.[1] If the indictment contains two counts, one defendant may be convicted on one count and the other on another.[2] But where a single offence is charged and it is proved that both defendants committed the offence described, but at different times, one only can be convicted; and that should be the one whose offence was first committed in time.[3]

When joint wrongdoers are tried together, each has the right to the prescribed number of challenges of jurors,[4] and to cross-examine the witnesses for the prosecution.[5]

§ 13. If two parties are jointly indicted, it is within the discretion of the court, upon application by either party or by the prosecution, to order a separate trial.[6] If a separate trial is refused, the defendant cannot complain unless there has been a plain abuse of discretion;[7] it is not necessarily an abuse of discretion, even if one party has confessed and not the other,

[1] R. *v.* Butterworth, R. & R. 520.

[2] Thompson *v.* P., 125 Ill. 256, 17 N. E. 749; C. *v.* Miller, 150 Mass. 69, 22 N. E. 434.

[3] R. *v.* Dovey, 2 Den. C. C. 86; C. *v.* Slate, 11 Gray 60.

[4] The Salisbury Cases, Plowd. 97; P. *v.* Welmer, 110 Mich. 248, 68 N. W. 141; *post*, § 239.

[5] S. *v.* Davis, 13 Mont. 384, 34 Pac. 182.

[6] U. S. *v.* Marchant, 12 Wheat. 480; P. *v.* Fuhrman, 103 Mich. 593, 61 N. W. 865; S. *v.* Thaden, 43 Minn. 325, 45 N. W. 614.

[7] U. S. *v.* Ball, 163 U. S. 662; Spies *v.* P., 122 Ill. 1, 12 N. E. 865; S. *v.* Taylor, 45 La. Ann. 605, 12 So. 927; S. *v.* Finley, 118 N. C. 1161, 24 S. E. 495. It is in some States provided by statute that a defendant shall upon his request have a separate trial, thus leaving no discretion in the court. S. *v.* Thaden, 43 Minn. 325, 45 N. W. 614; P. *v.* Clark, 102 N. Y. 735, 8 N. E. 38; S. *v.* Mason, 19 Wash. 94, 52 Pac. 525; N. Y. Co. Cr. Pro. § 391.

although in such a case the confession is admitted as against the defendant making it, and it is likely to influence the jury against the other defendant.[1]

§ 14. **A separate prosecution will lie against one person for a crime alleged to have been committed by him jointly with another.**[2] This is true of crimes which can only be committed jointly, like adultery,[3] incest,[4] and conspiracy.[5]

Where two persons are thus separately indicted for the same joint crime, it is within the discretion of the court to order a joint trial.[6]

[1] C. *v.* Bingham, 158 Mass. 169, 33 N. E. 341; *post*, § 281.

[2] P. *v.* Plyler, 121 Cal. 160, 53 Pac. 553; Johnson *v.* S., 53 Neb. 103, 73 N. W. 463.

[3] S. *v.* Watson (R. I.), 39 Atl. 193.

[4] P. *v.* Patterson, 102 Cal. 239, 36 Pac. 436.

[5] P. *v.* Richards, 67 Cal. 412.

[6] C. *v.* Seeley, 167 Mass. 163, 45 N. E. 91.

CHAPTER III.

ARREST.

§ 15. **If a complaint is made or an indictment found before the accused person is arrested, the court ordinarily issues a warrant for his arrest.** This is directed to the sheriff or other proper officer, and orders him to arrest the accused and bring him before the court at a time named.[1]

§ 16. **If the warrant is illegal on its face, the officer to whom it is directed cannot legally serve it, and the accused person may resist arrest.** All formalities required by law must be complied with. Thus if a seal is necessary the warrant is illegal without it;[2] and the warrant must profess to have been issued upon a sworn complaint.[3] The person to be arrested must be described by his true name.[4] If his name is not known he may be described as a person unknown, provided a sufficient description to identify him is added; otherwise a description of the accused as a person

[1] An alternative procedure, by which the accused may be summoned into court without an arrest, has been referred to. *Ante*, § 9; Mass. Stat. 1890, c. 225.

[2] S. *v.* Drake, 36 Me. 366. By the best authority, a seal is not necessary at common law. Starr *v.* U. S., 153 U. S. 614.

[3] Candle *v.* Seymour, 1 Q. B. 889; S. *v.* Higgins, 51 S. C. 51, 28 S. E. 15.

[4] West *v.* Cabell, 153 U. S. 78; Griswold *v.* Sedgwick, 6 Cow. 455; Scheer *v.* Keown, 29 Wis. 586. The doctrine of *idem sonans* (*infra*, § 127) applies. P. *v.* Gosch, 82 Mich. 22, 46 N. W. 101.

unknown, or by a fictitious name, is insufficient.[1] If the name was blank when the warrant was issued, and the blank was filled by the officer, the warrant is void.[2] The warrant must show on its face that the accused is charged with a criminal offence,[3] though the charge need not be stated with the particularity required in an indictment.[4]

§ 17. **Where the warrant is regular and legal in form, and so far as can be discovered from inspection, in substance also, and appears to have been issued by a court or magistrate having jurisdiction of the subject matter and of the person named, the officer is protected in the service** notwithstanding any error or irregularity in the previous proceedings, or any imposition practised on the court; and the person named in the warrant must submit to arrest.[5] And the officer must serve and is protected in serving the warrant, though he is aware of facts which show that the apparent jurisdiction of the court did not exist.[6] But it has been held in Massachusetts that an officer cannot legally arrest on a warrant issued in accordance with an unconstitutional statute.[7]

[1] Allison *v.* P., 6 Col. App. 80, 39 Pac. 903; C. *v.* Crotty, 10 All. 403. In Mead *v.* Haws, 7 Cow. 332, "John Doe, the person carrying off the cannon," was held insufficient to justify the arrest of one actually carrying off the cannon at the time of arrest; yet it would be hard in any case more particularly to describe an unknown person.

[2] Rafferty *v.* P., 69 Ill. 111, 72 Ill. 37; Alford *v.* S., 8 Tex. App. 545.

[3] Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101.

[4] P. *v.* Mead, 92 N. Y. 415.

[5] Matthews *v.* Densmore, 109 U. S. 216 (reversing 43 Mich. 461); Chase *v.* Ingalls, 97 Mass. 524; S. *v.* Weed, 21 N. H. 262; Savacool *v.* Boughton, 5 Wend. 170.

[6] P. *v.* Warren, 5 Hill 440; and see Wilmarth *v.* Burt, 7 Met. 257.

[7] Fisher *v.* McGirr, 1 Gray 1, 45.

§ 18. **An officer arresting on a warrant must have the warrant with him, and must show it on request.**[1] He may serve it at any time, even on Sunday.[2]

§ 19. **Even before complaint is made and a warrant issued, a person accused of crime may in some cases be arrested.** In this way the arrest is made before criminal proceedings are begun. It is necessary in such a case to take the prisoner before the proper magistrate at once, and make a complaint; if the prisoner is taken before the wrong magistrate,[3] or if there is unnecessary delay in making a complaint,[4] the person arresting becomes a trespasser *ab initio*. Delay at request of the prisoner will of course not make the arresting person chargeable.[5] If the act of the arresting party is regular, the arrest is not invalidated though the magistrate declines to hold the prisoner.[6] The right to arrest without a warrant is not confined to cases where the wrongdoer might otherwise escape.[7] The cases in which it exists are the following.

§ 20. **A peace officer may without a warrant arrest one on reasonable suspicion of his having committed felony;**

[1] Galliard *v.* Laxton, 2 B. & S. 363; P. *v.* McLean, 68 Mich. 480, 36 N. W. 231; Smith *v.* Clark, 53 N. J. L. 197, 21 Atl. 491. In New York, however, it was held to be enough for the officer to have the warrant, and so state, without showing it. Bellows *v.* Shannon, 2 Hill 86. Now, by statute, he must show the warrant on request. Co. Crim. Pro. § 173. In Texas, the arrest appears to be legal if a warrant has issued, though the officer did not have it with him. Cabell *v.* Arnold, 86 Tex. 102, 23 S. W. 645.

[2] Rawlins *v.* Ellis, 16 M. & W. 172.

[3] Papineau *v.* Bacon, 110 Mass. 319.

[4] Wright *v.* Court, 4 B. & C. 596; Tubbs *v.* Tukey, 3 Cush. 438.

[5] Wheeler *v.* Nesbitt, 24 How. 544; Nowak *v.* Waller, 10 N. Y. S. 199.

[6] Douglass *v.* Barber, 18 R. I. 459, 28 Atl. 805.

[7] Rohan *v.* Sawin, 5 Cush. 281.

and the arrest is valid, even though in fact no felony has been committed.[1] Whether the suspicion is reasonable should be determined by the court, if the facts are undisputed;[2] but where the evidence of the facts is contradictory the question must be submitted to the jury.[3]

§ 21. **A peace officer may arrest without a warrant for a breach of the peace committed in his presence,[4] but for no other misdemeanor,[5]** and he may therefore never arrest upon suspicion, however reasonable, in the case of a misdemeanor.[6] By statute the power of peace officers to arrest without a warrant is often extended to all misdemeanors committed in their presence.[7] Such statutes do not permit an arrest for a misdemeanor not actually committed in the presence of the officer.[8]

An act is in the officer's presence, though he cannot see it because of darkness, if he hears it close at hand;[9] so if standing outside a house he hears the

[1] Samuel *v.* Payne, 1 Doug. 359; McCarthy *v.* De Armit, 99 Pa. 63; Eanes *v.* S., 6 Humph. 53.

[2] Spencer *v.* Anness, 32 N. J. L. 100; Burns *v.* Erben, 40 N. Y. 463. It is doubtful whether this rule would be followed in Massachusetts. Bath *v.* Metcalf, 145 Mass. 274.

[3] Mitchell *v.* Wall, 111 Mass. 492.

[4] Douglass *v.* Barber, 18 R. I. 459, 28 Atl. 805.

[5] C. *v.* Wright, 158 Mass. 149, 33 N. E. 82; P. *v.* Haley, 48 Mich. 495; Ballard *v.* S., 43 Oh. S. 340, 1 N. E. 76.

[6] Fox *v.* Gaunt, 3 B. & Ad. 798; C. *v.* McLaughlin, 12 Cush. 615.

[7] Ballard *v.* S., 43 Oh. S. 340, 1 N. E. 76. Such a statute is constitutional. Mayo *v.* Wilson, 1 N. H. 53. The officer acting under such a statute takes the risk of the misdemeanor not having been committed. Phillips *v.* Fadden, 125 Mass. 198.

[8] Hughes *v.* C. (Ky.), 41 S. W. 294; Pinkerton *v.* Verberg, 78 Mich. 573, 44 N. W. 579.

[9] S. *v.* McAfee, 107 N. C. 812, 12 S. E. 435.

affray within.[1] But he cannot arrest if he did not come up until the affray was at an end.[2] The arrest must be made within a short time after the offence is committed.[3]

§ 22. **A private person may without a warrant arrest one on reasonable suspicion of his having committed a felony, provided a felony has been committed.** Both the actual commission of a felony and the reasonable nature of the suspicion must be proved to justify the arrest;[4] and therefore though a criminal act had been committed by the accused the arrest is illegal if it was technically a misdemeanor.[5]

§ 23. **A private person may interfere to prevent the commission of a felony or to quell a breach of the peace in his presence,** and in order to effect this result he may arrest, handing his prisoner over to a peace officer as soon as possible.[6]

§ 24. **One may be arrested without a warrant for felony committed in another State.**[7] — In such a case the

[1] Dilger *v.* C., 88 Ky. 550, 11 S. W. 651; S. *v.* Williams, 36 S. C. 493, 15 S. E. 554; Hawkins *v.* Lutton, 95 Wis. 492, 70 N. W. 483.

[2] P. *v.* Johnson, 86 Mich. 175, 48 N. W. 870; S. *v.* Lewis, 50 Oh. S. 179, 33 N. E. 405.

[3] R. *v.* Marsden, L. R. 1 C. C. 131. An hour was there held too long.

[4] Samuel *v.* Payne, 1 Doug. 359; S. *v.* Albright, 144 Mo. 638, 46 S. W. 620.

[5] Marsh *v.* Loader, 14 C. B. N. S. 535; Thorne *v.* Turck, 94 N. Y. 90.

[6] Price *v.* Seeley, 10 Cl. & F. 28; Handcock *v.* Baker, 2 B. & P. 260; Phillips *v.* Trull, 11 Johns. 486; S. *v.* Campbell, 107 N. C. 948, 12 S. E. 441.

[7] R. *v.* Kimberley, 2 Stra. 848; Morrell *v.* Quarles, 35 Ala. 544; S. *v.* Buzine, 4 Harr. 572; Simmons *v.* Vandyke, 138 Ind. 380, 37 N. E. 973 (*semble*); *In re* Fetter, 23 N. J. L. 311; P. *v.* Schenck, 2 Johns. 479; C. *v.* Deacon, 10 S. & R. 125 (*semble*). It has been held

prisoner must at once be taken for examination before the proper court in the place of arrest.[1] This cannot be done, of course, unless such court has authority to hear the matter; but it is held that this authority exists.[2]

It has even been held that an officer conveying a prisoner through another State on his way to his own may legally hold him under arrest in the former State.[3]

§ 25. **A private individual may be called upon by an officer to assist in an arrest.** Such a person is of course justified if the officer is justified; but it seems that if the officer has apparent authority the private person is justified even if the officer's authority proves to be insufficient,[4] or the officer by a subsequent irregularity becomes a trespasser *ab initio*.[5]

§ 26. **In effecting an arrest, or preventing an escape, the officer may use such force as is necessary, provided he does not endanger life.**[6] But one who has merely committed a misdemeanor should not be killed even if otherwise his arrest cannot be effected; and it is

in Pennsylvania that this rule does not apply where the crime was committed in a foreign country. C. *v.* Deacon, 10 S. & R. 125; and see S. *v.* Buzine, 4 Harr. 572; Cunningham *v.* Baker, 104 Ala. 160.

[1] Lavina *v.* S., 63 Ga. 513; Simmons *v.* Vandyke, 138 Ind. 380, 37 N. E. 973; *In re* Henry, 29 How. Pr. 185.

[2] S. *v.* Buzine, 4 Harr. 572; *In re* Rutter, 7 Abb. Pr. N. S. 67; *In re* Leland, 7 Abb. Pr. N. S. 64.

[3] *In re* Maney (Wash.), 55 Pac. 930.

[4] Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885; McMahan *v.* Green, 34 Vt. 69. But see *contra*, Oysted *v.* Shed, 12 Mass. 506, 511; Elder *v.* Morrison, 10 Wend. 128.

[5] Dehm *v.* Hinman, 56 Conn. 320, 15 Atl. 741.

[6] Harrison *v.* Hodgson, 10 B. & C. 445; Dehm *v.* Hinman, 56 Conn. 320, 15 Atl. 741; S. *v.* Pugh, 101 N. C. 737, 7 S. E. 757; Skidmore *v.* S., 43 Tex. 93.

illegal therefore to use force dangerous to life in order to prevent his escape.[1] The same rule applies in the case of felonies not punished with death.[2] If, however, the officer is actually resisted by force while making the arrest he may use all necessary force, even to the point of killing, to overcome the resistance; and this is true even in the case of a misdemeanor.[3] The wrongdoer is in such a case forcibly resisting the execution of the law.

If the arrest has been effected, and the prisoner is attempting to escape from the officer or from jail, but without the use of force (as by trying to run away), he may be killed to prevent escape if he is imprisoned for some (perhaps for all) felonies,[4] but not if he is imprisoned for a misdemeanor.[5] If even a misdemeanant uses force against an officer or jailer in the attempt to escape, he may be overcome by any necessary force, even if fatal;[6] and the same rule applies to resistance to a forcible rescue.[7]

If a prisoner has effected his escape, no greater force can be used to recapture him than could be used to effect the original arrest.[8]

[1] R. *v.* Dadson, 4 Cox C. C. 358; Head *v.* Martin, 85 Ky. 480; Brown *v.* Weaver (Miss.), 23 So. 388; S. *v.* Sigman, 106 N. C. 728, 11 S. E. 520.

[2] Storey *v.* S., 71 Ala. 329; S. *v.* Bryant, 65 N. C. 327.

[3] Clements *v.* S., 50 Ala. 117; Dilger *v.* C., 88 Ky. 550, 11 S. W. 651; S. *v.* Dierberger, 96 Mo. 666, 10 S. W. 168.

[4] U. S. *v.* Clark, 31 Fed. 710.

[5] U. S. *v.* Clark, 31 Fed. 710 (*semble*); Thomas *v.* Kinkead, 55 Ark. 502, 18 S. W. 854; Reneau *v.* S., 2 Lea 720. But see Jackson *v.* S., 76 Ga. 473; S. *v.* Sigman, 106 N. C. 728, 11 S. E. 520.

[6] S. *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

[7] S. *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

[8] Head *v.* Martin, 85 Ky. 480, 3 S. W. 622; Brown *v.* Weaver (Miss.), 23 So. 388; S. *v.* Sigman, 106 N. C. 728, 11 S. E. 520.

§ 27. **To effect an arrest, a dwelling-house may in a proper case be forcibly entered.** Where one is lawfully pursuing a flying felon to arrest him, he may follow him into a house, and may break the doors of the house if he is refused admittance.[1] An officer with a warrant for the arrest of a person for crime may use force to enter a house in which he reasonably believes the person to be,[2] even if the house is that of a third person.[3] And an officer without a warrant has a right to enter an unfastened door in order to arrest persons within engaged in a breach of the peace.[4]

§ 28. **An arrest may be complete without the use of physical force.** It is enough if the officer make known his intention and the person arrested submit.[5]

§ 29. **The prisoner after arrest must be treated with all reasonable consideration.** Thus, the officer must not handcuff him,[6] unless he deems it necessary to prevent escape or violence.[7]

Any article found upon the prisoner which is

[1] Cahill *v.* P., 106 Ill. 621; C. *v.* McGahey, 11 Gray 194; Brooks *v.* C., 61 Pa. 352, 358.

[2] Barnard *v.* Bartlett, 10 Cush. 500.

[3] C. *v.* Irwin, 1 All. 587; C. *v.* Reynolds, 120 Mass. 190; S. *v.* Mooring, 115 N. C. 709, 20 S. E. 182.

[4] C. *v.* Tobin, 108 Mass. 426.

[5] Hawk *v.* Ridgway, 33 Ill. 473; Mowry *v.* Chase, 100 Mass. 79; Josselyn *v.* McAllister, 25 Mich. 45; Ahern *v.* Collins, 39 Mo. 145; Emery *v.* Chesley, 18 N. H. 202; Gold *v.* Bissell, 1 Wend. 210.

[6] Wright *v.* Court, 4 B. & C. 596.

[7] Dehm *v.* Hinman, 56 Conn. 320, 15 Atl. 741; Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885; S. *v.* Sigman, 106 N. C. 728, 11 S. E. 520. It has, however, been held in Pennsylvania to be entirely within the jailer's discretion whether or not to handcuff a prisoner before indictment. C. *v.* Weber, 167 Pa. 153, 31 Atl. 481.

needed as evidence to prove the crime, or any property of another which he has acquired by the crime, may be taken from him;[1] all other property he has a right to keep and use, and it is a legal injury to take it from him.[2]

[1] R. *v.* Burgiss, 7 C. & P. 488; Houghton *v.* Bachman, 47 Barb. 388.

[2] Rex *v.* O'Donnell, 7 C. & P. 138; R. *v.* Kinsey, 7 C. & P. 447; R. *v.* Coxon, 7 C. & P. 651; Ferguson *v.* U. S., 64 Fed. 88.

CHAPTER IV.

EXTRADITION.

§ 30. THE authority of a warrant for arrest extends no further than the jurisdiction of the court issuing it, and in no case can it extend beyond the territory within which the court sits. If the person accused is found in another State or country he cannot legally be arrested on the warrant, or in any way except in accordance with the laws of the country in which he is. The laws of that country may provide for arresting him and sending him to the country where he committed his crime. This process is called extradition.

§ 31. **Extradition is granted only as the result of an agreement between the states or countries concerned. When these are entirely foreign to each other, such an arrangement is made by means of a treaty called an Extradition Treaty.** The matter is then regulated by the terms of the treaty. It is commonly provided in such treaties that no one shall be surrendered for a merely political offence; and whether in any particular case an offender is a political offender is a question of fact, and does not depend upon the nature of the offence charged.[1] Another common provision in extradition treaties is that a State shall not surrender its own citizens.[2]

[1] *In re* Castioni, [1891] 1 Q. B. 149; Ornelas *v.* Ruiz, 161 U. S. 502; *In re* Ezeta, 62 Fed. 972, 995.

[2] *Ex parte* McCabe, 46 Fed. 363, 369.

An accused person may of course be surrendered by the country in which he has sought asylum to the country in which he is accused of crime without an extradition treaty; and if that is done, he cannot object to the jurisdiction of the court to which he is surrendered.[1] In this country, however, an arrest would be illegal unless made in accordance with some rule of law; and no State can make any provision for surrendering fugitives from justice to foreign countries, since the Constitution of the United States provides that the United States alone can enter into foreign relations. Such a provision by a State would therefore be unconstitutional, and the person held could secure his discharge upon *habeas corpus*.[2]

Since foreign extradition takes place only because of a treaty, and only in the case of certain crimes, when extradition is demanded under a treaty for a certain crime there is an implied agreement that the accused shall be tried for that crime only; and if it is afterwards desired to try him for another crime, he must be first discharged from arrest and given an opportunity to return to the asylum.[3] Where, however, he was voluntarily surrendered, for a crime not covered by the treaty, it was held that he might be tried for another crime without having an opportunity to return to the asylum.[4]

§ 32. **Extradition between the States of the Union is pro-**

[1] *Ex parte* Foss, 102 Cal. 347, 36 Pac. 669, where one was surrendered by Hawaii to California without treaty requiring it.

[2] Holmes *v.* Jennison, 14 Pet. 540; P. *v.* Curtis, 50 N. Y. 321.

[3] U. S. *v.* Rauscher, 119 U. S. 407.

[4] *Ex parte* Foss, 102 Cal. 347, 36 Pac. 669.

vided for by the Constitution of the United States, which provides that fugitives from justice from one State shall be surrendered by any other into which they may come.[1] It is therefore the legal duty of each State to surrender a person accused in another State of any act there committed which was there a crime, though it was not then a crime in the State of refuge, and was not a crime anywhere at the time of adoption of the Constitution.[2] And since by the Constitution full faith and credit are to be given to the judicial proceedings of another State,[3] it is enough if the person sought is legally charged with crime, according to the law of the State demanding him.[4] He must be legally charged in the State where the crime was committed, and the fact of such charge having been made must appear in the proceedings for extradition.[5] It is not, however, necessary for the offence to be charged with all the formality required in an indictment, provided the substance of the charge sufficiently appears.[6] An indictment is not necessary; a complaint or information, valid in the demanding State, is enough.[7]

Since the interstate surrender of a fugitive for any crime is under the Constitution a matter of right, no one is harmed if a fugitive surrendered for one crime

[1] Art. 4, § 2.

[2] Kentucky *v.* Dennison, 24 How. 66.

[3] Art. 4, § 1.

[4] Kingsbury's Case, 106 Mass. 223; *In re* Clark, 9 Wend. 212; Wilcox *v.* Nolze, 34 Oh. S. 520.

[5] *Ex parte* White, 49 Cal. 433; *Ex parte* Spears, 88 Cal. 640, 26 Pac. 608; Smith *v.* S., 21 Neb. 552, 32 N. W. 594.

[6] Davis's Case, 122 Mass. 324; *Ex parte* Sheldon, 34 Oh. S. 319.

[7] *Ex parte* Hart, 59 Fed. 894; *In re* Hooper, 52 Wis. 699, 58 N. W. 741.

is tried for another; and in the case of interstate rendition this may be done.[1]

It has been held that a State may constitutionally make provision for the arrest and rendition to another State of fugitives from justice, in addition to the provisions of the act of Congress.[2]

§ 33. **One is a fugitive from justice if he has left the State where he committed a crime and is found in another,** though he did not leave to avoid prosecution,[3] and even though he is found in the State of his domicil.[4] But one cannot be called a fugitive unless he has physically left the State where the crime was committed. Therefore where the accused never was in that State, having committed his crime through an innocent agent, or through the mail, or by some other means which made him guilty though absent, he cannot be deemed a fugitive, and his surrender cannot be demanded.[5]

§ 34. **The procedure upon a demand for extradition is regulated by act of Congress.** Upon complaint on oath made to any authorized judge or commissioner of the United States or the judge of any court of record of any State, charging the commission in a foreign country of an indictable offence, the person

[1] Lascelles *v.* Georgia, 148 U. S. 537; Carr *v.* S., 104 Ala. 4, 16 So. 150; C. *v.* Wright, 158 Mass. 149, 33 N. E. 82; S. *v.* Stewart, 60 Wis. 587, 19 N. W. 429. Earlier decisions of State courts *contra* are therefore overruled. S. *v.* Hall, 40 Kan. 338, 19 Pac. 918; *In re* Cannon, 47 Mich. 481, 11 N. W. 280.

[2] *Ex parte* Cubreth, 49 Cal. 435.

[3] Roberts *v.* Reilly, 116 U. S. 80, 97.

[4] Kingsbury's Case, 106 Mass. 223; *In re* Sultan, 115 N. C. 57, 20 S. E. 375.

[5] *In re* Mohr, 73 Ala. 503; Hartman *v.* Aveline, 63 Ind. 344; Jones *v.* Leonard, 50 Ia. 106; S. *v.* Hall, 115 N. C. 811, 20 S. E. 729.

accused is arrested, brought before the court, and examined.[1] If sufficient evidence is produced to justify holding the accused according to the law of the forum,[2] he is committed to jail, and the proceedings with the evidence certified to the Secretary of State.[3] Any evidence is admissible which would be received in the country where the crime was committed.[4] The President (through the Secretary of State) thereupon issues his warrant for extradition, though he has discretion to refuse it;[5] and this warrant authorizes the representative of the demanding government to take and carry away the prisoner.[6]

In interstate rendition, an officer of the demanding State presents to the governor of the State of refuge a copy of the proceedings in the demanding State; if the governor is satisfied of the legality of the proceedings, he issues his warrant, by which the officer of the demanding State is authorized to arrest and take the accused.[7]

If the proceedings are regular it is the legal duty of the governor to issue the warrant;[8] if, however, he declines to do so, there is no method by which he can be compelled.[9] If the fugitive is also charged with crime in the State of refuge, extradition would

[1] U. S. Rev. St. § 5270.

[2] *In re* Farez, 7 Blatch. 345.

[3] R. S. § 5270.

[4] R. S. § 5271; Act of 19 June, 1876, c. 133.

[5] *In re* Stupp, 12 Blatch. 501.

[6] R. S. § 5272.

[7] R. S. § 5278 (Act of 12 Feb., 1793).

[8] Work *v.* Corrington, 34 Oh. S. 64; Ham *v.* S., 4 Tex. App. 645.

[9] Kentucky *v.* Dennison, 24 How. 66.

probably be postponed until his punishment for the latter crime had been accomplished.[1]

While a person whose extradition has been demanded, either by another State or by a foreign country, is in custody pending a surrender, even after the warrant of extradition has been issued, a writ of *habeas corpus* will lie to test the legality of the proceedings.[2] It lies, however, only for errors of law. The finding of the court or magistrate upon the complaint is final on all questions of fact,[3] such as whether the prisoner is a fugitive,[4] whether probable cause of guilt appears,[5] or whether the offence is a political one;[6] unless, indeed, there is absolutely no evidence to support the finding.

[1] Taylor *v.* Taintor, 16 Wall. 366 (*semble*); *Ex parte* Hobbs, 32 Tex. Cr. R. 312, 22 S. W. 1035.

[2] Robb *v.* Connolly, 111 U. S. 624; *In re* Farez, 7 Blatch. 345.

[3] Benson *v.* McMahon, 127 U. S. 457.

[4] *Ex parte* Reggel, 114 U. S. 642.

[5] *In re* Oteiza, 136 U. S. 330.

[6] Ornelas *v.* Ruiz, 161 U. S. 502.

CHAPTER V.

EXAMINATION, COMMITMENT, AND BAIL.

§ 35. AFTER arrest, the prisoner must be brought before a court for trial or examination. If the arrest was upon a warrant, the time is usually fixed in the warrant. If it was without a warrant, the prisoner is to be brought before the court at the first convenient time.

If the court has jurisdiction, it may proceed at once to try him;[1] the incidents of trial are examined later.[2] If the crime is a serious one, the court or magistrate before whom the prisoner is first brought examines the case in order to determine whether there is probable cause for holding him for trial in a higher court. The prisoner is entitled to have this question determined within a reasonable time, commonly fixed by statute. An adjournment without determining the matter can be only by consent of defendant[3] or for a statutory cause, which must appear on the record or the court loses jurisdiction.[4]

§ 36. **The defendant can be held for the action of the higher court only after a judicial determination of his probable guilt.** The prosecution must satisfy the

[1] See *ante*, § 9. [2] *Post*, Part III.

[3] C. *v.* Vincent, 160 Mass. 280, 35 N. E. 852.

[4] Hepler *v.* S., 43 Wis. 479; Harrington *v.* S., 50 Wis. 68, 6 N. W. 317.

court of this; but if the court is satisfied it is enough. The prosecution need not at this preliminary hearing produce all the evidence against the prisoner then in its possession.[1] The prisoner may be committed on his own confession, without further evidence.[2]

§ 37. **Irregularity in arresting the prisoner does not affect the jurisdiction of the court.**[3] Thus if the arrest was illegal, the court may nevertheless hear and punish;[4] so if the prisoner was illegally kidnapped in another State and forcibly brought within the jurisdiction.[5] But if the arrest was illegal, though the court has jurisdiction, the prisoner has a right to have the proceedings quashed; he must, however, seasonably demand this right, and if he assents to the proceedings without objecting, he is taken to have waived his right. The court, always having jurisdiction, may then proceed to punish.[6]

§ 38. **If probable cause is found the prisoner is committed to await the action of the higher court.** The commitment is a formal action of the court, and must be regularly ordered and entered upon the record. Where the examination is an essential part of the procedure (as in the procedure by examination and information) the jurisdiction of the higher court depends upon its regularity.[7]

[1] Emery *v.* S., 92 Wis. 146, 65 N. W. 848.

[2] P. *v.* Cokahnour, 120 Cal. 253, 52 Pac. 505.

[3] See *ante*, § 3.

[4] *Ex parte* Johnson, 167 U. S. 120; C. *v.* Tay, 170 Mass. 192, 48 N. E. 1086.

[5] *Ex parte* Scott, 9 B. & C. 446; Ker *v.* Illinois, 119 U. S. 436; Baker *v.* S., 88 Wis. 140, 59 N. W. 570.

[6] Ard *v.* S., 114 Ind. 542, 16 N. E. 504; P. *v.* Dowd, 44 Mich. 488, 7 N. W. 71; S. *v.* Fitzgerald, 51 Minn. 534, 53 N. W. 799.

[7] P. *v.* Thompson, 84 Cal. 598, 24 Pac. 384.

The prisoner is ordinarily either committed to jail, there to be held for the higher court; or else intrusted to the custody of private persons, who become responsible for his appearance in the higher court. These persons who thus become sureties for his appearance are called bail, and the process is known as admitting to bail.

§ 39. **Bail are private jailers of the prisoner, and remain legally in custody of him, though he is allowed to go at large.** They have the right at any time, personally or by agent, to take him into custody by force,[1] as well in another State as in that where he was committed to bail;[2] but not in a foreign country.[3] "The bail have their principal always upon a string, and may pull the string whenever they please and render him in their own discharge."[4] In order to take the prisoner, bail may break doors.[5] Bail may at any time discharge their obligation by producing the prisoner in court and surrendering him.[6]

§ 40. **The obligation of bail is to produce the prisoner to answer any prosecution growing out of the fact for which he is committed.** If the charge as first made is insufficient in law or is not accurate in fact, and a new accusation is prepared, growing out of the same acts, bail must produce the prisoner to answer it.[7]

[1] *Ex parte* Gibbons, 1 Atk. 238.

[2] *In re* Von der Ahe, 85 Fed. 959; C. *v.* Brickett, 8 Pick. 138; Nicolls *v.* Ingersoll, 7 Johns. 145; S. *v.* Lingerfelt, 109 N. C. 775, 14 S. E. 75.

[3] Reese *v.* U. S., 9 Wall. 13.

[4] Anon., 6 Mod. 231.

[5] Sheers *v.* Brooks, 2 H. Bl. 120; Read *v.* Case, 4 Conn. 166.

[6] S. *v.* Benzion, 79 Ia. 467, 44 N. W. 710; Harp *v.* Osgood, 2 Hill 216.

[7] S. *v.* Kyle, 99 Ala. 256, 13 So. 538; S. *v.* Bryant, 55 Ia. 451,

§ 41. **Where it becomes impossible to produce the prisoner, bail are discharged only if the impossibility arises from the act of God, of the obligee, or of the law.**[1] Thus if the prisoner dies, or is ordered by the court to go out of the custody of his sureties,[2] or is sent out of the State on extradition proceedings to be tried in another State,[3] bail are discharged. So if the prisoner is again arrested within the State and is held to answer the same or another charge, bail are not responsible while he is so held.[4] But if the prisoner has been discharged or has escaped from his second arrest, it has been held that bail are responsible for his subsequent appearance according to their obligation, since the law no longer prevents his production;[5] and if he goes into another State and is there arrested and held, bail are not excused.[6]

§ 42. **The responsibility of bail ends when custody of the prisoner is taken by an officer of the court.** So where the sheriff takes the prisoner by order of the court, bail are exonerated, though the order is afterwards discharged.[7] And when sentence is passed,

8 N. W. 303; C. *v.* Teevens, 143 Mass. 210, 9 N. E. 524; S. *v.* Hancock, 54 N. J. L. 393, 24 Atl. 726. In Oregon, by statute, this is not true, unless the first accusation is quashed on defendant's motion. Hyde *v.* Cross, 25 Or. 543, 37 Pac. 59.

[1] Tailor *v.* Taintor, 16 Wall. 366.

[2] Reese *v.* U. S., 9 Wall. 13.

[3] S. *v.* Allen, 2 Humph. 258.

[4] S. *v.* Orsler, 48 Ia. 343; Way *v.* Wright, 5 Met. 380; P. *v.* Bartlett, 3 Hill, 570.

[5] S. *v.* Crosby, 114 Ala. 11, 22 So. 110; Tedford *v.* S., 67 Miss. 363, 7 So. 352; Bishop *v.* S., 16 Oh. S. 419; Wheeler *v.* S., 38 Tex. 173.

[6] Tailor *v.* Taintor, 16 Wall. 366 (held by a majority of the court, with a strong dissent); Yarborough *v.* C., 89 Ky. 151, 12 S. W. 143.

[7] P. *v.* McReynolds, 102 Cal. 308, 36 Pac. 590.

and it becomes the duty of the sheriff to execute it, the prisoner being in court, bail are discharged.[1]

§ 43. **At common law it is within the discretion of the court to admit to bail one accused of any offence.** In the case of minor offences, admission to bail is a matter of course. In the case of a serious offence it is determined by the court after hearing the evidence, considering the seriousness of the charge, the nature of the evidence in support of it, and the severity of the punishment awarded by the law for the offence.[2] Bail may be allowed in a proper case even where the charge is treason[3] or murder.[4]

The admission to bail is a judicial act, and in the absence of statute it cannot be performed except by a court; not by the clerk,[5] nor even by a single judge, if the full bench alone constitutes the court.[6] The circumstances of the case and the condition of the prisoner will be considered, in determining the court's action on an application for bail. Thus illness resulting from the imprisonment is an inducement to admit to bail, but not necessarily a constitutional illness not resulting from the imprisonment; and the lapse of considerable time without bringing the case to trial is a strong reason for bail.[7]

§ 44. **The right to bail is commonly secured and regulated by constitutional provision.** It is common to pro-

[1] Jackson *v.* S., 52 Kan. 249, 34 Pac. 744.

[2] *Ex parte* Barronet, 1 E. & B. 1; *Ex parte* Tayloe, 5 Cow. 39.

[3] R. *v.* Wyndham, 1 Stra. 2.

[4] *Ex parte* Barronet, 1 E. & B. 1. The court intimated that bail would never in fact be allowed when there is an admitted wilful killing. See P. *v.* McLeod, 1 Hill 377, 26 Wend. 663, 698.

[5] Gregory *v.* S., 94 Ind. 384.

[6] Powell *v.* S., 15 Oh. 579.

[7] R. *v.* Wyndham, 1 Stra. 2.

vide that bail shall be allowed as of right in all cases except in capital crimes where the proof is evident or the presumption strong. A petitioner for release on the ground that proof is not evident must establish his case by evidence.[1] By the better opinion, a petitioner is allowed to show this, if he can, even if he has been indicted by the grand jury;[2] though the fact that the grand jury has found an indictment is to be considered.[3] On the other hand, while the fact that the jury has disagreed at a first trial tends to show that the proof is not evident, and is therefore to be considered when an application is made for bail pending a second trial,[4] it is not conclusive on the point.[5] In general, bail will not be granted in a capital case unless the evidence is so slight that upon it a court would set aside a verdict of guilty.[6]

If a person assaulted is alive but in danger of death, it has been held that, the crime not yet having become murder, the prisoner is entitled to bail.[7]

The right to bail after conviction, pending an appeal, is not granted by the constitutions, and may be regulated by statute.[8] Thus it is constitutional to provide by statute that one shall be imprisoned pend-

[1] *Ex parte* Richards, 102 Ind. 260, 1 N. E. 639; S. *v.* Crocker, 5 Wyo. 385, 40 Pac. 681.

[2] *In re* Losasso, 15 Col. 163, 24 Pac. 1080; *Ex parte* Kendall, 100 Ind. 599; *Ex parte* Randon, 12 Tex. App. 145. *Contra*, P. *v.* Tinder, 19 Cal. 539.

[3] Brown *v.* S., 147 Ind. 28, 46 N. E. 34.

[4] *In re* Goans, 99 Mo. 193, 12 S. W. 635.

[5] S. *v.* Summons, 19 Oh. 139.

[6] *In re* Troia, 64 Cal. 152, 28 Pac. 231; S. *v.* Summons, 19 Oh. 139.

[7] Dunlap *v.* Bartlett, 10 Gray 282.

[8] *Ex parte* Voll, 41 Cal. 29; *In re* Shoemaker, 2 Ok. 606, 39 Pac. 284; *Ex parte* Ezell, 40 Tex. 451.

ing appeal,[1] or that execution of the sentence shall begin pending appeal unless the court certifies that a doubtful question of law is involved.[2]

[1] *In re* Boulter, 5 Wyo. 263, 39 Pac. 875.
[2] C. *v.* Brown, 167 Mass. 144, 45 N. E. 1.

CHAPTER VI.

THE GRAND JURY.

§ 45. **The grand jury is a body of men summoned from all parts of the county to pass upon accusations of crime within the county.** It is a peculiarly English institution, having been instituted at least as early as the reign of Henry II.[1] It was brought to this country by the colonists, and is regarded as so essential to liberty that it is required in many constitutions.[2]

§ 46. **The number of jurors is variable, but must not fall below twelve nor exceed twenty-three.** The concurrence of twelve men being necessary for a verdict, that number must be present;[3] and since twelve voices are enough for a verdict, it is necessary that twelve should constitute a majority of the jury, otherwise a verdict might be found by a minority of voices.[4] Between these limits the number may vary.[5]

A different number of jurors is often fixed by statute.[6] Where the number is so fixed it is usually

[1] 2 P. & M. Hist. Eng. Law 639. [2] *Ante*, § 11.

[3] Clyncard's Case, Cro. Eliz. 654; Low's Case, 4 Me. 439.

[4] Note, 2 Burr. 1088; R. *v.* Marsh, 6 A. & E. 236; P. *v.* King, 2 Cai. 98.

[5] C. *v.* Wood, 2 Cush. 149. In Alabama, the number as fixed at the beginning of the term must continue throughout the term. Williams *v.* S., 98 Ala. 52, 13 So. 333.

[6] P. *v.* Simmons, 119 Cal. 1, 50 Pac. 844; S. *v.* Belvel, 89 Ia. 405, 56 N. W. 545; Lyles *v.* C., 88 Va. 396, 13 S. E. 802; Fitzgerald *v.* S., 4 Wis. 395.

held that the number cannot be exceeded, but may vary between the fixed limits, as at common law.[1] Where a "grand jury" is required by the Constitution, it has been held that the number of jurors required to find an accusation cannot be reduced below twelve.[2]

§ 47. **The qualifications of the jurors and the method of empanelling are usually fixed by statute.** At common law personal interest in the prosecution will not disqualify a grand juror; for instance, relationship to the person injured,[3] nor even the fact that the juror himself was injured by the crime,[4] or that he subscribed money to suppress it.[5] Since the jury may find an indictment on its own knowledge, no formed or even expressed opinion of the guilt of the accused is a disqualification.[6]

If one of the panel is challenged and ruled to be incompetent, the remaining jurors (being sufficient in number) may find a valid indictment, the incompetent juror taking no part in the deliberations.[7]

In some jurisdictions the presence on the jury of one peronally qualified to serve, but irregularly drawn or not legally on the jury list, will not vitiate an

[1] P. *v.* Simmons, 119 Cal. 1, 50 Pac. 844; S. *v.* Cooley (Minn.), 75 N. W. 729. *Contra*, Doyle *v.* S., 17 Oh. 222.

[2] English *v.* S., 31 Fla. 356, 12 So. 689; S. *v.* Barker, 107 N. C. 913, 12 S. E. 115; S. *v.* Hartley, 22 Nev. 342, 40 Pac. 872.

[3] S. *v.* Russell, 90 Ia. 569, 58 N. W. 915; C. *v.* Brown, 147 Mass. 585, 18 N. E. 587; S. *v.* Maddox, 1 Lea 671.

[4] S. *v.* Rickey, 5 Halst. 83. [5] Koch *v.* S., 32 Oh. S. 353.

[6] S. *v.* Hamlin, 47 Conn. 95; Musick *v.* P., 40 Ill. 268; Tucker's Case, 8 Mass. 286. But see *contra*, P. *v.* Jewett, 3 Wend. 314; N. Y. Co. Crim. Pro. § 239.

[7] P. *v.* Simmons, 119 Cal. 1, 50 Pac. 844; T. *v.* Staples, 2 Ia. 778, 26 Pac. 166.

indictment;[1] in other States an irregularity in empanelling vitiates the indictment.[2] An objection to the empanelling, if made, must in some States be taken, if possible, by a challenge to the array, and objection to an individual juror by a challenge to him;[3] in other States the defendant may for such a cause plead in abatement.[4] In any jurisdiction the objection comes too late after a plea to the merits.[5]

The grand jury continues in office until dissolved by the court or by law;[6] it has no power to dissolve itself.[7]

§ 48. **The grand jury upon appearing in court is organized by the choice of a foreman (either by the jurors or by the court), and the jurors are then sworn** "that you will diligently inquire and true presentment make of all such articles, matters and things as shall be given you in charge or otherwise come to your knowledge touching the present service; the Commonwealth's counsel, your fellows', and your own you shall keep secret; you shall present none for envy, hatred, or malice, nor shall you leave any one unpresented for

[1] U. S. *v.* Tallman, 10 Blatch. 21; C. *v.* Brown, 147 Mass. 585, 18 N. E. 587; S. *v.* Cooley (Minn.), 75 N. W. 729; S. *v.* Matthews, 88 Mo. 121; Huling *v.* S., 17 Oh. S. 583.

[2] S. *v.* Flemming, 66 Me. 142; Avirett *v.* S., 76 Md. 510, 25 Atl. 676, 987; S. *v.* Ward, 60 Vt. 142, 14 Atl. 187.

[3] Cross *v.* S., 63 Ala. 40; P. *v.* Travers, 88 Cal. 233; S. *v.* Hamlin, 47 Conn. 95; Musick *v.* P., 40 Ill. 268; S. *v.* Donaldson, 43 Kan. 431, 23 Pac. 650.

[4] S. *v.* Clough, 49 Me. 573; S. *v.* Fertilizer Co., 111 N. C. 658, 16 S. E. 231; Doyle *v.* S., 17 Oh. 222; Vanhook *v.* S., 12 Tex. 252; S. *v.* Cole, 17 Wis. 674.

[5] Taylor *v.* C., 90 Va. 109, 17 S. E. 812.

[6] *In re* Gannon, 69 Cal. 541, 11 Pac. 240.

[7] Clem *v.* S., 33 Ind. 418; S. *v.* Will, 97 Ia. 58, 65 N. W. 1010.

fear, favor, affection, hope of reward or gain." This oath is essential to the validity of the grand jury's action; it is not, however, necessary that the panel be sworn in a body. The jurors may take the oath separately.[1] The common practice is for the foreman to take the oath alone, in the presence of the others, and for the rest of the panel then to swear that they will abide by the provisions of his oath.

§ 49. **The jurors are then instructed by the judge.** In his charge the court may direct their attention to particular matters requiring their action, or to the probable commission of particular offences; he must not, however, express an opinion that particular persons are guilty of crime,[2] or even that a particular affair is in fact a crime,[3] as that would be invading the province of the jury.

The jury may from time to time be advised as to the law, at their request, by the court; and it has been held that even if part only of the jurors seek and obtain such advice, their finding is legal.[4]

§ 50. **Having been charged by the judge, the grand jury withdraw to sit, receive, and pass upon accusations of crime.** Ordinarily the prosecuting attorney presents to the jury written accusations against such as are accused, and supports the accusations by evidence. A written accusation so presented to the grand jury is called a *bill*. The prosecuting attorney may have framed a bill on facts within his own knowledge, or

[1] Brown *v.* S., 10 Ark. 607; Wadlin's Case, 11 Mass. 142.

[2] S. *v.* Will, 97 Ia. 58, 65 N. W. 1010; S. *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

[3] Clair *v.* S., 40 Neb. 534, 59 N. W. 118.

[4] S. *v.* Edgerton, 100 Ia. 63, 69 N. W. 280.

on facts made known to him by individuals, or (most commonly) in cases investigated by a lower court, where the accused person had already been arrested and held for trial.

The grand jury usually acts in this way on bills presented to it and on evidence produced before it by a prosecuting officer; but the grand jury may indict for crime upon its own motion from the knowledge of a member,[1] or even upon the information of an outsider, without examination by a magistrate or bill presented by the prosecuting attorney.[2] So a member of the jury may use knowledge he has acquired independently of the evidence presented,[3] as by means of a private investigation.[4] It is, however, held in Pennsylvania that a grand jury cannot legally find an indictment on evidence introduced by a private prosecutor, not moved thereto by judge, jury, or district attorney;[5] nor on the irrelevant testimony of a witness in another matter.[6]

The grand jury has power to inquire into all crimes, as well those committed by corporations as those committed by natural persons;[7] including crimes committed after the beginning of the term[8] or the empanelling of the jury.[9]

[1] S. v. Wilcox, 104 N. C. 847, 10 S. E. 453; S. v. Lee, 87 Tenn. 114, 9 S. W. 425.

[2] Blaney v. S., 74 Md. 153, 21 Atl. 547.

[3] C. v. Woodward, 157 Mass. 516, 32 N. E. 939.

[4] C. v. Hayden, 163 Mass. 453, 40 N. E. 846.

[5] McCullough v. C., 67 Pa. 30.

[6] C. v. Green, 126 Pa. 531, 17 Atl. 878.

[7] S. v. Security Bank, 2 S. D. 538, 51 N. W. 337.

[8] C. v. Gee, 6 Cush. 174.

[9] P. v. Beatty, 14 Cal. 566.

It seems that the grand jury might in a proper case view premises; but in order to do so it must get an order of the court.[1]

Refusal to testify before the grand jury is a punishable contempt; and one cannot excuse himself for a refusal to testify by alleging an irregularity in empanelling the jury.[2] The contempt cannot, however, be punished by the jury, but must be dealt with by the court.[3]

The accused cannot be heard or produce witnesses before the grand jury,[4] for the indictment is only an accusation of crime, proof of which is to be made at another time. The function of the grand jury is only to protect persons against the necessity of defending themselves against unfounded accusations. "A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes, and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes."[5]

§ 51. **A grand jury may investigate any matter, although a former jury has already dealt with it.** Thus, although a former jury has found an indictment for the same offence, and this former indictment is still pending, another may be found against the same defendant; the pendency of the former indictment

[1] Wyatt *v.* P., 17 Col. 252, 28 Pac. 961.

[2] *Ex parte* Haymond, 91 Cal. 545, 27 Pac. 859.

[3] *In re* Gannon, 69 Cal. 541, 11 Pac. 240; Wyatt *v.* P., 17 Col. 252, 28 Pac. 961.

[4] P. *v.* Goldenson, 76 Cal. 328, 19 Pac. 161. In Connecticut, it is within the discretion of the court to allow him the privilege. S. *v.* Hamlin, 47 Conn. 95.

[5] 4 Bl. Com. 303.

being no cause for abatement.[1] The former indictment is not superseded by the finding of the second;[2] both are in force, and the defendant may be tried upon both at once.[3] Even if the former indictment has been removed to another county for prejudice, the grand jury may find a second, on which trial must be had in the original county unless it also is removed.[4]

If one grand jury has ignored a bill, another may, nevertheless, find it a true bill;[5] and it has been held that the very grand jury which has ignored a bill may reconsider its action, and find a true bill.[6]

If an indictment is quashed for invalidity, the same grand jury may find another indictment without hearing evidence anew;[7] and this, though some new jurymen are on the jury.[8]

§ 52. **In most jurisdictions the sufficiency or the competency of the evidence on which the grand jury acted cannot be inquired into;**[9] even if it was found entirely on illegal evidence, as the compelled testimony of the defendant himself.[10] In some jurisdictions, however, the indictment will be quashed (on a seasonable

[1] C. *v.* Drew, 3 Cush. 279; P. *v.* Fisher, 14 Wend. 9; Whiting *v.* S., 48 Oh. S. 220, 27 N. E. 96.

[2] P. *v.* Oyer & Terminer, 20 Wend. 108.

[3] S. *v.* Lee, 114 N. C. 844, 19 S. E. 375.

[4] S. *v.* Billings, 140 Mo. 193, 41 S. W. 778.

[5] S. *v.* Collis, 73 Ia. 542, 35 N. W. 625; S. *v.* Harris, 91 N. C. 656.

[6] U. S. *v.* Simmons, 46 Fed. 65; but see *contra*, R. *v.* Humphreys, Car. & M. 601.

[7] Creek *v.* S., 24 Ind. 151; McIntire *v.* C. (Ky.), 4 S. W. 1; S. *v.* Richard, 50 La. Ann. 210, 23 So. 331; Whiting *v.* S., 48 Oh. S. 220, 27 N. E. 96. But see S. *v.* Ivey, 100 N. C. 539, 5 S. E. 407.

[8] C. *v.* Clune, 162 Mass. 206, 38 N. E. 435.

[9] Agee *v.* S., 117 Ala. 169, 23 So. 486; S. *v.* Fasset, 16 Conn. 457, 471; Stewart *v.* S., 24 Ind. 142; S. *v.* Fowler, 52 Ia. 103, 2 N. W. 983; S. *v.* Dayton, 23 N. J. L. 49; Turk *v.* S., 7 Oh. pt. ii. 240.

[10] P. *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

motion) if the evidence on which it was found was insufficient,[1] or if the only evidence was legally incompetent.[2]

§ 53. **The proceedings of the grand jury are secret.** No one should be allowed in the grand jury room during their deliberations except the necessary persons. The witnesses testifying and the prosecuting attorney[3] are of course admissible at the proper stage of the proceedings. If an attorney is specially employed to prosecute, in case of disqualification of the prosecuting attorney, he may attend the sessions of the grand jury in place of the latter.[4] And a deputy of the prosecuting attorney may in his place attend the grand jury.[5] By the better view a stenographer may by employment of the prosecuting attorney be present in the grand jury room to assist him.[6]

No one, whether prosecuting attorney, bailiff, or any other, must be present while the grand jury is voting;[7] though his presence does not vitiate the indictment unless it prejudiced the defendant.[8]

[1] U. S. *v.* Farrington, 5 Fed. 343; S. *v.* Cole, 145 Mo. 672, 47 S. W. 895.

[2] Boone *v.* P., 148 Ill. 440, 36 N. E. 99; S. *v.* Froiseth, 16 Minn. 296; Hope *v.* P., 83 N. Y. 418; P. *v.* Singer, 18 Abb. N. C. 96. Not if there was other evidence besides that of the incompetent witness. S. *v.* Shreve, 137 Mo. 1, 38 S. W. 548.

[3] Gitchell *v.* P., 146 Ill. 175, 33 N. E. 757; S. *v.* Baker, 33 W. Va. 319, 10 S. E. 639.

[4] S. *v.* Kovolosky, 92 Ia. 498, 61 N. W. 223.

[5] Raymond *v.* P., 2 Col. App. 329, 30 Pac. 504; S. *v.* Fertig, 98 Ia. 139, 67 N. W. 87.

[6] S. *v.* Bates, 148 Ind. 610, 48 N. E. 2; S. *v.* Brewster, 70 Vt. 341, 40 Atl. 1037. *Contra*, S. *v.* Bowman, 90 Me. 363, 38 Atl. 331.

[7] S. *v.* Kimball, 29 Ia. 267 (*semble*); C. *v.* Bradley, 126 Pa. 199, 17 Atl. 600.

[8] U. S. *v.* Terry, 39 Fed. 355; S. *v.* Justus, 11 Or. 178, 8 Pac. 337. But see Wilson *v.* S., 70 Miss. 595, 13 So. 225.

A grand juror cannot generally be permitted to testify as to what happened in the grand jury room. He is absolutely forbidden to state how any member of the jury voted. In case of need, he may be required to testify to certain matters, as what evidence was presented to the jury,[1] who were examined as witnesses,[2] and what other persons were present, and what they did.[3]

§ 54. **If twelve jurors agree that the allegations of the bill are sustained by the evidence presented, the bill should be indorsed "a true bill,"** and the indorsement signed by the foreman. The omission of the indorsement is, however, according to the better opinion, a mere irregularity which can be corrected by the record, and it therefore does not vitiate the indictment.[4] Where the omission is by statute fatal, the objection must be made before pleading to the merits.[5] In most jurisdictions the indorsement "a true bill" is conclusive that twelve jurors voted in favor of the bill, and it cannot be contradicted.[6] In a few States, however, it may be shown by the testimony of mem-

[1] U. S. *v.* Farrington, 5 Fed. 343, 348; S. *v.* Coffee, 56 Conn. 399; Izer *v.* S., 77 Md. 110, 26 Atl. 282; C. *v.* Mead, 12 Gray 167.

[2] *Ex parte* Schmidt, 71 Cal. 212, 12 Pac. 55; C. *v.* Hill, 11 Cush. 137.

[3] S. *v.* Will, 97 Ia. 58, 65 N. W. 1010.

[4] Frisbie *v.* U. S., 157 U. S. 160; C. *v.* Smyth, 11 Cush. 473; S. *v.* Freeman, 13 N. H. 488; Price *v.* C., 21 Grat. 846. *Contra*, Strange *v.* S., 110 Ind. 354, 11 N. E. 357; and see Whiting *v.* S., 48 Oh. S. 220, 27 N. E. 96.

[5] P. *v.* Johnston, 48 Cal. 549; S. *v.* Murphy, 47 Mo. 274.

[6] R. *v.* Marsh, 6 A. & E. 236; S. *v.* Hamlin, 47 Conn. 95; Gitchell *v.* P., 146 Ill. 175, 33 N. E. 757; Creek *v.* S., 24 Ind. 151; S. *v.* Beebe, 17 Minn. 241; S. *v.* Baker, 20 Mo. 338; Zeigler *v.* C. (Pa.), 14 Atl. 237.

bers of the jury that twelve men did not, in fact, concur in finding a true bill.[1]

If twelve jurors do not agree in finding the bill, it is indorsed *ignoramus*, and in common phrase is said to be "ignored."

§ 55. **If a bill is found a true bill, it is to be returned by the foreman in open court and presented to the court as found. Upon this "presentment" in open court the bill becomes an indictment.** The return of the bill in open court must be shown by the record, or a conviction will be set aside.[2] But after objection made for defect of such record, the court (if a return had been made in fact) may order the entry to be made *nunc pro tunc*.[3]

§ 56. **If an indictment or information is lost, its place may be supplied by a copy,** which then becomes the legal accusation,[4] and so remains even if the lost pleading is found.[5] It is necessary, however, to prove that the substituted paper is a substantial copy of the original.[6] If the indictment is mutilated, but may still be put together so as to be perfectly read, it is good.[7]

[1] Sparrenberger *v.* S., 53 Ala. 481; Low's Case, 4 Me. 439; P. *v.* Shattuck, 6 Abb. N. C. 33. In *Ex parte* Sontag, 64 Cal. 525, 2 Pac. 402, it was held that on this question a grand juror at least cannot be *compelled* to testify.

[2] Sattler *v.* P., 59 Ill. 68; S. *v.* Pitts, 39 La. Ann. 914, 3 So. 118; Simmons *v.* C., 89 Va. 156, 15 S. E. 386.

[3] Keener *v.* S., 97 Ga. 388, 24 S. E. 28; Kirkham *v.* P., 170 Ill. 9, 48 N. E. 465; Waterman *v.* S., 116 Ind. 51, 18 N. E. 63.

[4] Long *v.* P., 135 Ill. 435, 25 N. E. 851; S. *v.* Shank, 79 Ia. 47, 44 N. W. 241.

[5] Branson *v.* S. (Ga.), 24 S. E. 404.

[6] S. *v.* Thomas, 97 Ia. 396, 66 N. W. 743.

[7] C. *v.* Roland, 97 Mass. 598.

§ 57. **Indictment by the grand jury is not required for due process of law,** and a statute permitting prosecution without such indictment is not unconstitutional in a State where a grand jury is not expressly required by the Constitution.[1] There is such a requirement in the Constitution of the United States, but it applies only to prosecutions in the federal courts, not to prosecutions by a State.[2]

[1] McNulty *v.* California, 149 U. S. 645; Hurtado *v.* California, 110 U. S. 516; *In re* Dolph, 17 Col. 35, 28 Pac. 470; Rowan *v.* S., 30 Wis. 129. *Contra*, Jones *v.* Robbins, 8 Gray 329.

[2] Spies *v.* Illinois, 123 U. S. 131; S. *v.* Boswell, 104 Ind. 541, 4 N. E. 675; S. *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

CHAPTER VII.

ARRAIGNMENT AND PLEA.

§ 58. **After arrest and the filing of a formal accusation of crime, the accused must be brought before the court, arraigned, and required to plead.** At his arraignment the defendant is called to the bar, the accusation is read to him, and he is called upon to plead to it. The arraignment may take place as soon as the prisoner is actually in court, even if not arrested, by warrant or otherwise, on the charge.[1] The accused person at his arraignment and throughout his trial must be treated with humanity. He is not to be brought to the bar with marks of ignominy, nor is he to be manacled unless there is danger of rescue or escape.[2] Indeed, it has been held that unnecessary constraint is unconstitutional, since it hampers him in his defence.[3]

The personal arraignment and plea of the accused are necessary. If the record does not show that the defendant was personally arraigned and entered his plea, a judgment against him will be reversed, at least in a case of felony,[4] even though it appears that

[1] S. *v.* Keena, 64 Conn. 212, 29 Atl. 470.

[2] Hawk. P. C. ch. 28, § 1; S. *v.* Kring, 64 Mo. 591.

[3] P. *v.* Harrington, 42 Cal. 165; S. *v.* Williams, 18 Wash. 47, 50 Pac. 580.

[4] Crain *v.* U. S., 162 U. S., 625; S. *v.* Wilson, 42 Kan. 587, 22 Pac. 622; S. *v.* Williams, 117 Mo. 379, 22 S. W. 1104; Browning *v.*

an attempt was made to cure the error by having the prisoner plead during the trial.[1]

The defendant may waive arraignment and plead without being arraigned; this is legal;[2] so he may waive certain statutory requirements, such as furnishing a copy of the indictment to the accused.[3]

When a new trial has been granted after a conviction another arraignment is not necessary,[4] nor can defendant demand a rearraignment in order that he may enter a different plea.[5] The same thing is true when the venue is changed after arraignment,[6] and, at least in some jurisdictions, after an appeal from an inferior to a superior court.[7]

§ 59. **The accused must plead personally.** But it has been held that a plea of guilty made by nodding the head when asked if he meant to plead guilty, there being no fraud or mistake shown, is sufficient.[8] And where the defendant's attorney pleaded not guilty for him, in his presence, the irregularity was held no ground for a new trial.[9] The plea cannot be waived, since if there is no plea there is no issue to

S., 54 Neb. 203, 74 N. W. 631; Davis *v.* S., 38 Wis. 487. In Iowa, however, if the record is silent, regularity will be presumed. S. *v.* Bowman, 78 Ia. 519, 43 N. W. 302.

[1] Parkinson *v.* P., 135 Ill. 401, 25 N. E. 764.

[2] S. *v.* Comings, 54 Minn. 359, 56 N. W. 50; S. *v.* Weeden, 133 Mo. 70, 34 S. W. 473.

[3] Kelly *v.* P., 182 Ill. 363, 24 N. E. 56.

[4] Levy *v.* S., 49 Ala. 390; Reynolds *v.* S., 34 Fla. 175, 16 So. 78; S. *v.* Simms, 71 Mo. 538.

[5] P. *v.* McElvaine, 125 N. Y. 596, 26 N. E. 929.

[6] Davis *v.* S., 39 Md. 355, 384.

[7] C. *v.* Hagarman, 10 All. 401.

[8] S. *v.* Blake, 5 Wyo. 107, 38 Pac. 354.

[9] Stewart *v.* S., 111 Ind. 554, 13 N. E. 59.

try.[1] But this doctrine is modified by modern statutes which govern proceedings where the defendant will not plead.

At common law if a defendant refused to plead to the indictment, or technically *stood mute*, a jury was empanelled to inquire whether he stood mute obstinately or *ex visitatione Dei*. If the latter was the case, he could not be tried.[2] If he stood mute obstinately, he was induced to plead by torture.[3] This was changed by statute, so that a plea of *guilty* was entered when a defendant obstinately stood mute.[4] It is now more mercifully provided that when a person stands mute at his arraignment a plea of *not guilty* shall be entered for him.[5] Since this statute, if the defendant is present in court and goes to trial without a formal plea, he must be deemed to have pleaded not guilty. If the record shows him present, therefore, and not objecting to trial, a conviction cannot be set aside though the entry of the plea is informal[6] or altogether lacking.[7]

[1] Crain *v.* U. S., 162 U. S. 625; Jackson *v.* S., 91 Ala. 55, 8 So. 773.

[2] C. *v.* Braley, 1 Mass. 103; S. *v.* Doherty, 2 Overt. 80.

[3] The *peine forte et dure*. See 4 Bl. Com. 324; 1 Steph. Hist. Cr. Law 297.

[4] C. *v.* Moore, 9 Mass. 402.

[5] U. S. Rev. St. § 1032; Mass. Pub. St. ch. 213, § 37; N. Y. Co. Cr. Pro. § 342. The statute applies to all criminal proceedings, though by its terms it refers only to indictments. C. *v.* McKenna, 125 Mass. 397.

[6] C. *v.* McKenna, 125 Mass. 397.

[7] P. *v.* Bowman, 81 Cal. 566, 22 Pac. 917; S. *v.* Thompson, 95 Ia. 464, 64 N. W. 419; S. *v.* Glave, 51 Kan. 330, 33 Pac. 8; P. *v.* Bradner, 107 N. Y. 1, 13 N. E. 87. But in some jurisdictions it is held that it must appear of record that the plea was entered on defendant's standing mute, and therefore that a conviction must be reversed if no plea is on the record. P. *v.* Monaghan, 102 Cal. 229, 36 Pac. 511; S. *v.* Hunter, 43 La. Ann. 157, 8 So. 624.

On being called upon to plead, the defendant may demur, or he may plead in abatement, or in bar. The pleas in bar are not guilty, and former conviction or acquittal. He may confess the charge by a plea of guilty, or he may decline to defend by the so-called plea *nolo contendere.*

The pleas of guilty, not guilty, and *nolo contendere* must be pleaded verbally; the pleas in abatement or of former conviction or acquittal must be in writing.[1] In some States, insanity is to be set up by a special plea.[2]

§ 60. **The defendant may demur to an indictment for insufficiency in law.** The statute of jeofails does not apply to criminal proceedings,[3] and a general demurrer therefore attacks defects of form as well as of substance. If a demurrer is overruled, the defendant has no right to plead over: final judgment is given against him, whether the offence is felony or misdemeanor.[4] The court may, however, in its discretion give him leave to withdraw the demurrer and enter a plea;[5] and the absolute right to do this is commonly extended to defendants by statute.[6]

In New York, if a demurrer is allowed the defendant cannot be prosecuted again for the same offence except by leave of court.[7]

[1] Crawford *v.* S., 112 Ala. 1, 21 So. 214. In some States all pleas in bar are oral. N. Y. Co. Cr. Pro. § 333.

[2] Hoiss *v.* S., 79 Wis. 513, 48 N. W. 517.

[3] 4 Bl. Com. 375.

[4] R. *v.* Faderman, 4 Cox C. C. 359; P. *v.* Taylor, 3 Den. 91, 98.

[5] R. *v.* Birmingham & Gloucester Ry., 3 Q. B. 223; Evans *v.* C., 3 Met. 453.

[6] P. *v.* Monaghan, 102 Cal. 229, 36 Pac. 511; S. *v.* Abrisch, 42 Minn. 202, 43 N. W. 1115; N. Y. Co. Cr. Pro. § 330.

[7] N. Y. Co. Cr. Pro. § 327.

§ 61. Any matter which is an excuse for refusal to answer, such as lack of jurisdiction of the court or misnomer of the defendant, must be pleaded in abatement. This plea being an excuse for refusing to answer the charge, it is too late to interpose it after any kind of plea in bar has been entered,[1] or even simultaneously with a plea in bar.[2] If a plea in bar is filed after a plea in abatement, the latter is regarded as waived; but if a plea in abatement is irregularly filed after a plea in bar it is simply void, and the latter remains in force.[3]

A plea in abatement, being a merely dilatory plea, is regarded by the court with disfavor. It will be held bad on demurrer for the least defect in form.[4] It must state all necessary facts,[5] and not mere conclusions of law,[6] and must be verified.[7]

Issue must be taken on the plea, either by demurrer or replication; and the ordinary rules of pleading apply. So on a demurrer to a replication the prosecution may attack the plea.[8] Failure to take issue on the plea will be immaterial error, and will not work a discontinuance, if the plea is insufficient

[1] Agnew *v.* U. S., 165 U. S. 36; S. *v.* Dibble, 59 Conn. 168, 22 Atl. 155; Henning *v.* S., 106 Ind. 386, 6 N. E. 803; S. *v.* Watson (R. I.), 39 Atl. 193. Therefore a plea in abatement cannot contain matter which should be pleaded in bar. S. *v.* Bailey (Neb.), 77 N. W. 654.

[2] Bush *v.* S., 55 Neb. 195, 75 N. W. 542.

[3] Baker *v.* S., 88 Wis. 140, 155, 59 N. W. 570.

[4] Jenkins *v.* S., 35 Fla. 737, 18 So. 182; Billings *v.* S., 107 Ind. 54, 6 N. E. 914; Dolan *v.* P., 64 N. Y. 485.

[5] S. *v.* Drake, 125 Ind. 367, 25 N. E. 434.

[6] Priest *v.* S., 10 Neb. 393, 6 N. W. 468.

[7] R. *v.* Grainger, 3 Burr. 1617; S. *v.* Allen, 91 Me. 258, 39 Atl. 994.

[8] Reeves *v.* S., 29 Fla. 527, 10 So. 901.

in law,[1] or if it can be proved untrue in fact by the record.[2] If it sets up facts outside the record, the issue is to be tried by a jury.[3]

If a plea in abatement is found against the defendant on the facts he cannot answer over, at common law; judgment must be entered against him.[4] If the plea is overruled for defect of law, on the other hand, the judgment is *respondeat ouster;* he must plead in bar.[5] When a demurrer to a plea in abatement is overruled, or an issue of fact found against the prosecution, the defendant is not discharged, but is held for further proceedings.[6]

§ 62. **If defendant has already been tried on the same charge, he must set up the defence of former jeopardy by a special plea of former conviction or acquittal.**[7] The defence of former jeopardy cannot be relied on unless it is set up by a special plea,[8] except where the former jeopardy was in the same proceedings, and is therefore already on record.[9] The plea must set out the record of the former trial, or must at least sufficiently aver it, with name of the court and time,[10] and must show a verdict, or an unexcused failure to find a verdict.[11]

[1] Baker *v.* S., 80 Wis. 416, 50 N. W. 518.

[2] Lester *v.* S., 91 Wis. 249, 64 N. W. 850.

[3] Bolln *v.* S., 51 Neb. 581, 71 N. W. 444.

[4] R. *v.* Gibson, 8 East 107.

[5] R. *v.* Johnson, 6 East 583; S. *v.* Allen, 91 Me. 258, 39 Atl. 994.

[6] Rowland *v.* S., 126 Ind. 517, 26 N. E. 485.

[7] In some States there is a third form of plea setting up merely former jeopardy. P. *v.* Tucker, 115 Cal. 337, 47 Pac. 111.

[8] P. *v.* Bennett, 114 Cal. 56, 45 Pac. 1013; C. *v.* O'Neil (Mass.), 29 N. E. 1146; Barton *v.* S. (Tex. Cr. R.), 43 S. W. 987.

[9] S. *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

[10] P. *v.* O'Leary (Cal.), 22 Pac. 24.

[11] Hensley *v.* S., 107 Ind. 587, 8 N. E. 692; S. *v.* Cross, 44 W. Va.

The prosecution must either attack the plea by a demurrer, for defect of form or substance,[1] or must reply;[2] and the defendant may rejoin to the replication.[3] The record of the former trial must be proved by production of the record, not by parol,[4] but the two offences may be identified by parol if they are not on the face of the records so diverse that they could under no circumstances be identical. If the offences are not capable of identification, the court will overrule the plea without submitting the question to the jury;[5] otherwise the question of identity is for the jury.[6]

It is a common practice to allow former conviction and acquittal and not guilty to be pleaded together;[7] in which case in some jurisdictions the two issues are tried simultaneously by the same jury.[8] When this is done, a jury cannot convict without expressly finding both issues against the defendant.[9] Former

315, 29 S. E. 527. For the form of such a plea, see S. *v.* Cooper, 1 Green (13 N. J. L.) 361.

[1] T. *v.* King, 6 Dak. 131, 50 N. W. 623.

[2] Duncan *v.* C., 6 Dana 295. Statute sometimes makes a replication unnecessary. S. *v.* Jamison, 108 Ia. —, 73 N. W. 831.

[3] C. *v.* Curtis, 11 Pick. 134.

[4] Walter *v.* S., 105 Ind. 589, 5 N. E. 735.

[5] S. *v.* Lee, 46 La. Ann. 623, 15 So. 159; Wright *v.* S. (Tex. Cr.), 40 S. W. 491.

[6] Freeman *v.* S., 119 Ind. 501, 21 N. E. 1101; S. *v.* Huffman, 136 Mo. 58, 37 S. W. 797; P. *v.* McGowan, 17 Wend. 386; McCullough *v.* S. (Tex. Cr. R.), 34 S. W. 753.

[7] Thompson *v.* U. S., 155 U. S. 271. *Contra* in Massachusetts: C. *v.* Merrill, 8 All. 545.

[8] P. *v.* Connor, 142 N. Y. 130, 36 N. E. 807; S. *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367. But see Thompson *v.* U. S., 155 U. S. 271.

[9] P. *v.* Tucker, 115 Cal. 337, 47 Pac. 111.

jeopardy may in any jurisdiction be pleaded and tried alone.[1]

If a plea of former jeopardy is found against the defendant on the facts, he has no absolute right to answer over.[2] If, however, it is overruled on demurrer, the defendant may answer over, either by an amended special plea or by the plea of not guilty.[3]

§ 63. **The plea of guilty is an admission of all the facts alleged in the indictment, and has the same effect as a conviction.**[4] In a capital case it is to be received with caution, and only after warning the defendant of the consequences.[5] The so-called plea does not raise an issue, and there is therefore nothing to try. Statutes sometimes require a hearing by the court to determine the degree of guilt; this, however, not being a trial, defendant has no constitutional right to a jury.[6]

After a plea of guilty, as after a conviction, the defendant may move in arrest of judgment for a substantial defect in the indictment.[7]

§ 64. **The plea of nolo contendere is equivalent to a**

[1] P. *v.* Trimble, 131 N. Y. 118, 29 N. E. 1100.

[2] P. *v.* Briggs, 1 Dak. 302, 46 N. W. 451. *Contra*, P. *v.* Trimble, 131 N. Y. 118, 29 N. E. 1100.

[3] C. *v.* Golding, 14 Gray 49; Foster *v.* C., 8 W. & S. 77; Fulkner *v.* S., 3 Heisk. 33. *Contra* in England in misdemeanors, though not in felonies. R. *v.* Bird, 5 Cox C. C. 20.

[4] P. *v.* Converse, 74 Mich. 478, 42 N. W. 70.

[5] C. *v.* Battis, 1 Mass. 95. Statutory regulations sometimes govern the reception of the plea. Johnson *v.* S. (Tex. Cr. R.), 48 S. W. 70.

[6] P. *v.* Noll, 20 Cal. 164; S. *v.* Almy, 67 N. H. 274, 28 Atl. 372; Craig *v.* S., 49 Oh. S. 415, 30 N. E. 1120. Where, however, the jury must assess the punishment, they must determine this question. Wartner *v.* S., 102 Ind. 51, 1 N. E. 65.

[7] S. *v.* Watson, 41 La. An. 598, 7 So. 125.

plea of guilty. It differs only in the consequence that it cannot be shown in a civil action as an admission of the truth of the accusation.[1] Sentence is imposed, as upon a plea of guilty;[2] and it is deemed a conviction, so that the owner of goods stolen may sue for their value as upon conviction.[3] The defendant can plead *nolo contendere* only by leave of court.[4]

§ 65. **A plea once made may be withdrawn by leave of court,** in order to move to quash, to demur, or to plead a different plea.[5] This is allowed with special freedom where the defendant has pleaded guilty, and in a strong case the withdrawal of that plea has been allowed even after sentence, by direction of an appellate court,[6] though where even the plea of guilty was freely entered, the court will not, without special reason, allow it to be withdrawn.[7]

The action of the court in refusing to allow a plea withdrawn may, in a case of clear abuse of discretion, be reversed by an appellate court.[8]

[1] C. *v.* Horton, 9 Pick. 206.

[2] C. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449; C. *v.* Holstine, 132 Pa. 357, 19 Atl. 273.

[3] Barker *v.* Almy (R. I.), 39 Atl. 185.

[4] C. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449.

[5] P. *v.* Villarino, 66 Cal. 228, 5 Pac. 154; Mills *v.* S., 76 Md. 274, 25 Atl. 229; C. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449; S. *v.* Arbes (Minn.), 73 N. W. 403; Early *v.* C., 86 Va. 921, 11 S. E. 795; Richards *v.* S., 82 Wis. 172, 51 N. W. 652.

[6] Myers *v.* S., 115 Ind. 554, 18 N. E. 42; S. *v.* Calhoun, 50 Kan. 523, 32 Pac. 38.

[7] Monahan *v.* S., 135 Ind. 216, 34 N. E. 967; S. *v.* Richardson, 98 Mo. 564, 12 S. W. 245.

[8] Myers *v.* S., 115 Ind. 554, 18 N. E. 42; Salina *v.* Cooper, 45 Kan. 12, 25 Pac. 233; S. *v.* Van Nice, 7 S. D. 104, 63 N. W. 537; Richards *v.* S., 82 Wis. 172, 51 N. W. 652. *Contra*, Clark *v.* S., 57 N. J. L. 489, 31 Atl. 979. In Maryland, this may be done to demur,

§ 66. **A plea puis darrein continuance setting out matters of defence which have arisen since the arraignment, may be pleaded at any time before judgment.** Leave of court is not necessary to interpose such a plea.[1]

but not to plead in abatement. Cochrane *v.* S., 6 Md. 400; Cooper *v.* S., 64 Md. 40, 20 Atl. 986.

[1] Lovell *v.* Eastaff, 3 T. R. 554; S. *v.* Salge, 2 Nev. 321.

CHAPTER VIII.

JEOPARDY.

§ 67. **No man is to be brought into jeopardy more than once for the same offence.** This was an ancient doctrine of the common law,[1] and has been adopted into most of our constitutions. It is often stated as a prohibition against bringing a man a second time in jeopardy of *life or limb*;[2] but the principle is a general one, and prevents a second jeopardy in the case of all crimes, whether felonies or misdemeanors.[3]

To constitute jeopardy, the same offence must be twice dealt with penally. Punishing a wrongdoer after he has been forced in a civil suit to make compensation for the same act is not double jeopardy.[4]

§ 68. **The same act may be an offence against two jurisdictions, and in that case jeopardy in one is no bar to prosecution by the other.** The constitutional provisions against double jeopardy apply only to two prosecutions by the State which has adopted the constitution. Thus the same act may be an offence against the United States and against one of the

[1] 4 Bl. Com. 335.

[2] Now and then a court, in view of this phrase, has restricted the constitutional prohibition to offences punishable as felonies. S. *v.* Smith, 53 Ark. 24, 13 S. W. 391; C. *v.* Roby, 12 Pick. 496 (*semble*).

[3] *Ex parte* Lange, 18 Wall. 163.

[4] S. *v.* Roby, 142 Ind. 168, 41 N. E. 145; and see U. S. *v.* Olsen, 57 Fed. 579.

States, and may be punished in both,[1] though the fact of previous punishment in one might be considered in assessing the amount of punishment in the other.[2] Thus embezzlement of the funds of a national bank may be a crime against the United States, as an offence against the national banking act, and also the crime of embezzlement, independently punished as such by the State.[3] This principle has so far been extended by some courts that they hold the same act, if it violates both a State statute and a city ordinance or by-law, punishable both by State and by city.[4] But the better view in such a case appears to be that punishment under one law bars prosecution under the other.[5]

§ 69. **Former jeopardy in any court which had jurisdiction, even a magistrate's court, will bar subsequent proceedings for the same offence.**[6] But one accused of crime is not brought into jeopardy by the preliminary examination before a magistrate, since in such a proceeding he cannot be subjected to punishment. Therefore, if upon such preliminary examination before a magistrate the accused is either held or

[1] Moore *v.* Illinois, 14 How. 13; Phillips *v.* P., 55 Ill. 429. See U. S. *v.* Pirates, 5 Wheat. 184. Similarly the same act, it has been held, may be punished both by the United States and by a Territory. S. *v.* Norman, 16 Ut. 457, 52 Pac. 986.

[2] U. S. *v.* Amy, 14 Md. 149 *n.*

[3] C. *v.* Barry, 116 Mass. 1.

[4] *Ex parte* Hong Shen, 98 Cal. 681, 33 Pac. 799; Ambrose *v.* S., 6 Ind. 351; S. *v.* Lee, 29 Minn. 445, 13 N. W. 913; S. *v.* Reid, 115 N. C. 741, 20 S. E. 468; Koch *v.* S., 53 Oh. S. 433, 41 N. E. 689; Yankton *v.* Douglass, 8 S. D. 441, 66 N. W. 923.

[5] Hankins *v.* P., 106 Ill. 628; P. *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124 (*semble*); S. *v.* Thornton, 37 Mo. 360; and by statute, Davis *v.* S., 37 Tex. Cr. R. 359, 39 S. W. 937.

[6] S. *v.* Bowen, 45 Minn. 145, 47 N. W. 650; S. *v.* Layne, 96 Tenn. 668, 36 S. W. 390.

discharged, he may be subsequently prosecuted anew for the same offence.[1] Where a magistrate has the option of taking jurisdiction of the offence and trying the accused, or of inquiring into the case with a view to holding the accused for the higher court, and he does, in fact, discharge the accused, whether this constitutes an acquittal or not depends on whether he chose to try the case or merely to conduct a preliminary examination; and this is a question of fact on the record.[2] But where the magistrate has no legal power to decline jurisdiction, but he did, in fact, hear the case and bind over the defendant, it constitutes jeopardy.[3]

§ 70. **Inflicting an increased punishment for a second or third offence is not objectionable as bringing the defendant a second time in jeopardy,** since he is not again punished for the former offence; the entire punishment is on account of the last offence.[4] The increased punishment may also be inflicted again at the next conviction.[5]

The general principle may be thus stated:—

§ 71. **If a defendant has once been acquitted upon a valid indictment in a court having jurisdiction of the offence, he cannot again be tried, though his acquittal resulted from an error in the trial.**[6] This principle

[1] Gaffney *v.* Circuit Judge, 85 Mich. 138, 48 N. W. 478; *Ex parte* Garst, 10 Neb. 78, 4 N. W. 511; Jambor *v.* S., 75 Wis. 664, 44 N. W. 963.

[2] C. *v.* Sullivan, 156 Mass. 487, 31 N. E. 647.

[3] Brown *v.* S., 105 Ala. 117, 16 So. 929.

[4] Moore *v.* Missouri, 159 U. S. 673; P. *v.* Stanley, 47 Cal. 113; Plumbly *v.* C., 2 Met. 413; Ingalls *v.* S., 48 Wis. 647, 4 N. W. 785.

[5] C. *v.* Mott, 21 Pick. 492.

[6] U. S. *v.* Sanges, 144 U. S. 310; P. *v.* Roberts, 114 Cal. 67, 45 Pac. 1016; P. *v.* Miner, 144 Ill. 308, 33 N. E. 40; P. *v.* Corning, 2 N. Y. 9; S. *v.* Kemp, 17 Wis. 669.

has the important consequence that the prosecution can never have corrected an error of law committed at the trial to its prejudice.[1]

§ 72. **Though the indictment upon which the former trial proceeded differed from the later indictment, the two offences may be proved by parol evidence to be the same,** provided the facts of the offence can possibly support both indictments.[2] The identity of the crimes is sometimes established merely by a comparison of the records; but parol evidence is often necessary. Thus, after having been acquitted for stealing the horse of A, the defendant was indicted for stealing the horse of a person unknown, he would be entitled to a verdict on proof that the horse in question really belonged to A.[3] This identity must be established by the defendant.[4]

Though it is a question of fact whether the two offences are identical, it is a question which may be determined by the court on inspection of the records. In most cases the court can say whether the offences are the same. Thus the offences of burglary and of larceny within the house broken are necessarily different, and former trial for one is no bar to an indictment for the other; the same thing is true of larceny and embezzlement,[6] of larceny by false personation

[1] *Post*, § 338.

[2] Dunn *v.* S., 70 Ind. 47; P. *v.* McGowan, 17 Wend. 386. See Swalley *v.* P., 116 Ill. 247, 4 N. E. 379.

[3] S. *v.* Wiseback, 139 Mo. 214, 40 S. W. 946.

[4] C. *v.* Fredericks, 155 Mass. 455, 29 N. E. 622; C. *v.* Sutherland, 109 Mass. 342; S. *v.* Lawson, 123 N. C. 740, 31 S. E. 667; S. *v.* Howe (Or.), 44 Pac. 672. See Bainbridge *v.* S., 30 Oh. S. 264.

[5] S. *v.* Ingalls, 98 Ia. 728, 68 N. W. 445; P. *v.* Parrow, 80 Mich. 567, 45 N. W. 514.

[6] C. *v.* Tenney, 97 Mass. 50.

and by false pretences,[1] of forgery and uttering the forged instrument,[2] or of burglary by entering with intent and burglary by entering and stealing.[3] So the offences of principal and accessory are different: a person having already been tried as accessory may be again tried as principal, or *vice versa*.[4]

§ 73. **Even if the two indictments are identical, they may be shown by parol evidence to be directed against different acts.** This is true if the time is alleged to have been different,[5] and (since the time usually need not be proved as laid in the indictment)[6] even when the time is alleged to be the same.[7] Where, however, for any reason the prosecution would be so far limited in its proof of time that the facts that could be shown under the second indictment could not have been shown under the first, the two offences are necessarily distinct;[8] as where the offence is a continuous one, so that the prosecution is confined to proof of acts within the alleged time. If, therefore, in the case of such an offence the times alleged in the two indictments are entirely distinct, there can have been no former jeopardy;[9] while if any part of

[1] S. *v.* Reiff, 14 Wash. 664, 45 Pac. 318.

[2] Green *v.* S., 36 Tex. Cr. R. 109, 35 S. W. 971. But uttering and swindling by use of the instrument are the same. Huff *v.* C. (Ky.), 42 S. W. 907; Hirshfield *v.* S., 11 Tex. App. 207.

[3] Vandercomb's Case, 2 Leach C. C. 708.

[4] R. *v.* Plant, 7 C. & P. 575; Reynolds *v.* P., 83 Ill. 479. This rule is changed where by statute an accessory may be convicted as principal. Davis *v.* P., 22 Col. 1, 43 Pac. 122.

[5] S. *v.* Waterman, 87 Ia. 255, 54 N. W. 359; P. *v.* Sinell, 131 N. Y. 571, 30 N. E. 47.

[6] *Post*, § 145.

[7] Chesapeake & O. R. R. *v.* C., 88 Ky. 368, 11 S. W. 87.

[8] S. *v.* Ingraham, 96 Ia. 278, 65 N. W. 152.

[9] Fleming *v.* S, 28 Tex. App. 234, 12 S. W. 605.

the time in the two indictments is common, and the acts are identical, there has been jeopardy.[1]

§ 74. **Where on the first trial an acquittal was had because of variance between indictment and proof, the accused may again be tried upon an indictment stating the facts correctly.** The offences described in the two indictments are distinct, and evidence necessary to prove one could not possibly prove the other. Thus the second indictment will lie when there is a material difference between the two as to the name of a person,[2] as where the name of the judge before whom a false oath was taken is differently stated;[3] so where a building was formerly described as a dwelling-house, and now as a building of another sort;[4] and where goods were formerly described as cloth, now as overcoats;[5] and so where the venue was differently stated.[6]

Where, however, the variance is immaterial, so that the facts stated in the second indictment might have been proved under the first, the two offences are identical, and the former trial is a bar;[7] as where a building formerly described as A's is now described as B's, occupied by A.[8]

§ 75. **By a single act a man may commit two distinct offences, and prosecution for one of them is no bar to a**

[1] S. *v.* Brownrigg, 87 Me. 500, 33 Atl. 11; C. *v.* Dunster, 145 Mass. 101, 13 N. E. 350.

[2] P. *v.* Oreileus, 79 Cal. 178, 21 Pac. 724; C. *v.* Wade, 17 Pick. 395; Wheelock *v.* S. (Tex. Cr. R.), 38 S. W. 182.

[3] Turner *v.* C. (Ky.), 42 S. W. 1129.

[4] P. *v.* Handley, 93 Mich. 46, 52 N. W. 1032.

[5] C. *v.* Clair, 7 All. 525. [6] C. *v.* Call, 21 Pick. 509.

[7] Knox *v.* S., 89 Ga. 259, 15 S. E. 308; Colliver *v.* C., 90 Ky. 262, 13 S. W. 922; Morrison *v.* S., 37 Tex. Cr. R. 601, 43 S. W. 113.

[8] S. *v.* Copeland, 46 S. C. 13, 23 S. E. 980. See *infra*, § 171.

subsequent prosecution for the other.[1] So maintaining a liquor nuisance and an illegal sale which contributes toward the nuisance are separate offences, to be separately punished;[2] and two offences may be committed when by the same act the defendant sells without a license to a minor[3] or on Sunday.[4]

§ 76. **If one is indicted for an offence which forms part of a greater offence already prosecuted, and on the former indictment a conviction might have been had of the crime now prosecuted, the former prosecution for the greater offence bars the present prosecution.**[5] Thus, the acts being the same, a prosecution for robbery bars a subsequent prosecution for larceny;[6] and for disorderly conduct, or for causing personal harm, bars a prosecution for assault and battery.[7]

§ 77. **By the better view, a former conviction or acquittal is a bar to prosecution for a greater offence of which the offence formerly prosecuted forms a necessary and integral part.**[8] Thus a former trial on a charge of fornication bars an indictment for rape or for bastardy growing out of the same transaction;[9] former

[1] R. *v.* Button, 11 Q. B. 929; S. *v.* Horneman, 16 Kan. 452.

[2] C. *v.* Sullivan, 150 Mass. 315, 23 N. E. 47; S. *v.* Wheeler, 62 Vt. 439, 20 Atl. 601.

[3] Ruble *v.* S., 51 Ark. 170, 10 S. W. 262; C. *v.* Vaughn (Ky.), 42 S. W. 117.

[4] Arrington *v.* C., 87 Va. 96, 12 S. E. 224.

[5] U. S. *v.* Wilson, 7 Pet. 150.

[6] P. *v.* McGowan, 17 Wend. 386.

[7] Wemyss *v.* Hopkins, L. R. 10 Q. B. 378; Lynch *v.* C. (Ky.), 35 S. W. 264; Preston *v.* P., 45 Mich. 486, 8 N. W. 96.

[8] S. *v.* Wiles, 26 Minn. 381, 4 N. W. 615; Mitchell *v.* S., 42 Oh. S. 383.

[9] C. *v.* Arner, 149 Pa. 35, 24 Atl. 83; C. *v.* Lloyd, 141 Pa. 28, 21 Atl. 411.

trial for assault and battery bars a prosecution for felonious assault;[1] for larceny, bars robbery or other aggravated form of larceny;[2] for battery, bars riot.[3]

So where one crime is a common element of the crime formerly indicted and the one now charged, and a conviction might be had for it on either indictment, former conviction or acquittal is a bar. Thus a conviction of assault on an information for assault with intent to kill bars an information for mayhem;[4] assault with intent to kill, a charge of assault with intent to rob;[5] assault to kill, robbery;[6] assault and battery, assault to rape.[7]

If, however, conviction could not or need not be had for the less crime on the first indictment, acquittal on it will not bar prosecution on the other. So where one had been acquitted of assault with intent to kill, he might afterwards be convicted of murder, since the latter crime may be committed without an intentional assault.[8] And conviction for lewd and lascivious cohabitation is no bar to conviction for adultery, since the gist of the former offence is habitual lewdness, while the latter offence is a single act of adulterous intercourse.[9] The objection

[1] Franklin *v.* S., 85 Ga. 570, 11 S. E. 876; S. *v.* Hatcher, 136 Mo. 641, 38 S. W. 719.

[2] S. *v.* Wiles, 26 Minn. 381, 4 N. W. 615; S. *v.* Lewis, 2 Hawks 98.

[3] S. *v.* Ingles, 2 Hayw. 4.

[4] P. *v.* Defoor, 100 Cal. 150, 34 Pac. 642.

[5] S. *v.* Chinault, 55 Kan. 326, 40 Pac. 662.

[6] Herera *v.* S., 35 Tex. Cr. R. 607, 34 S. W. 943.

[7] Bell *v.* S., 103 Ga. 397, 30 S. E. 294.

[8] R. *v.* Calvi, 10 Cox C. C. 481 *n.* Under the English practice, there need be no conviction of assault, though proved, on an indictment for assault with intent.

[9] Morey *v.* C., 108 Mass. 433.

to this practice has been strongly stated, and a different result reached, where after a conviction for arson an attempt was made to punish the defendant for murder by involuntarily burning a person in the house.[1] The doctrine may really result in punishing twice that part of the defendant's act which was a common element of the two crimes.

In some States it is held that a conviction for murder may be had after a former conviction or acquittal for the assault which caused the death, at least if the death was subsequent to the former trial;[2] and in a few States it is held, generally, that conviction for a less crime does not bar prosecution for a greater crime which includes it.[3]

§ 78. **If two persons are similarly injured by a single act there is but one crime, and can be but one prosecution.**[4] Thus, where with a single blow the defendant killed two men, there was but one offence, and a conviction for killing one bars a prosecution for killing the other.[5] Where, however, the acts of killing are separate, though near together, there are two offences, and there may be a separate prosecution for

[1] S. *v.* Cooper, 1 Green (13 N. J. L.) 361.

[2] S. *v.* Littlefield, 70 Me. 452; C. *v.* Roby, 12 Pick. 496; R. *v.* Morris, 10 Cox C. C. 480. The doctrine of the old English law appears to have been different. Pardon of the assault prevents prosecution for murder if death subsequently takes place (Cole's Case, Plowd. 401), unless murder is expressly excepted in the pardon. Nicholas' Case, Fost. C. L. 64.

[3] S. *v.* Foster, 33 Ia. 525; S. *v.* Huffman, 136 Mo. 58, 37 S. W. 797; Henkel *v.* S., 27 Tex. App. 510, 11 S. W. 671 (statutory).

[4] See a full discussion of this same principle in connection with the rule against duplicity, *post*, § 107.

[5] Clem *v.* S., 42 Ind. 420; Gunter *v.* S., 111 Ala. 23, 20 So. 632. *Contra*, P. *v.* Majors, 65 Cal. 138, 3 Pac. 597.

each killing.[1] So where defendant wounds two men by a single stroke, there is but one crime, and prosecution for battery on one bars prosecution for battery on the other;[2] but where successive blows are given in the same affray, and different persons are struck by them, each blow is a separate offence.[3] So where defendant attempted to shoot A, when a struggle followed, the pistol exploded, and B was shot, prosecution for the murder of B will not bar prosecution for assault on A with intent to kill;[4] but where defendant shot at A, missed him, and the shot killed B, conviction for manslaughter of B bars prosecution for assault on A.[5] Where defendant introduced into jail one file to assist two prisoners to escape, conviction for introducing to assist the escape of one is a bar to the charge of introducing to assist the escape of the other.[6]

Where several libellous statements are contained in the same newspaper, it is held there can be but one prosecution for them;[7] but it has been held that where several slanderous statements are made at the same time in the presence of the same people, about different persons, they are separate offences.[8] In the first case the libels were by the same act of publication, in the second, necessarily by separate acts.

[1] S. *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

[2] S. *v.* Damon, 2 Tyler 387; Sadberry *v.* S. (Tex. Cr. R.), 46 S. W. 639.

[3] Greenwood *v.* S., 64 Ind. 250; Baker *v.* C. (Ky.), 47 S. W. 864; P. *v.* Ochotski (Mich.), 73 N. W. 889.

[4] Winn *v.* S., 82 Wis. 571, 52 N. W. 775.

[5] Carson *v.* P., 4 Col. App. 463, 36 Pac. 551.

[6] Hurst *v.* S., 86 Ala. 604, 6 So. 120.

[7] P. *v.* Stephens, 79 Cal. 428, 21 Pac. 856.

[8] Collins *v.* S. (Tex. Cr. R.), 44 S. W. 846.

Where by a single act the defendant stole several chattels, there was but one larceny, and a second prosecution is barred,[1] even if the goods belonged to different owners.[2] But where the acts are successive, the crimes are different, and may be separately prosecuted; and this though they are all done on the same occasion, as the robbery of all the passengers in a stage coach.[3] So where defendant, while his bank was insolvent, received deposits from two persons, he committed two crimes.[4]

§ 79. **Jeopardy begins when a jury is sworn and charged with the trial of the issue.** From that time the accused has a right to be dealt with according to the verdict of that jury, and (except in cases to be examined later) he cannot be tried for the same offence before any other jury.[5] Therefore, if after that time the jury is needlessly discharged without his express consent, he cannot again be tried.[6] And if, after the jury is sworn, the prosecuting attorney

[1] Jackson *v.* S., 14 Ind. 327.

[2] R. *v.* Giddins, C. & M. 634; C. *v.* Williams, Thach. C. C. 84; S. *v.* Nelson, 29 Me. 329. In Texas, an acquittal on the charge of taking the goods of one owner will not bar a prosecution for taking the goods of the other, but a conviction will. Wright *v.* S., 37 Tex. Cr. R. 627, 40 S. W. 491.

[3] *In re* Allison, 13 Col. 525, 22 Pac. 820; S. *v.* English, 14 Mont. 399, 36 Pac. 815; S. *v.* Bynum, 117 N. C. 749, 23 S. E. 218; R. *v.* Smith, Ry. & M. 295. See R. *v.* Birdseye, 4 C. & P. 386, which holds that where the takings are practically simultaneous, though separated by a minute, there should be only one prosecution. Opposed to American cases, *supra*, but it would seem to be the better practice.

[4] S. *v.* Burlingame (Mo.), 48 S. W. 72.

[5] P. *v.* Webb, 38 Cal. 467; Huff *v.* C. (Ky.), 42 S. W. 907; S. *v.* Robinson, 46 La. Ann. 769, 15 So. 146; Hines *v.* S., 24 Oh. S. 134.

[6] Robinson *v.* C., 88 Ky. 386, 11 S. W. 210; S. *v.* Sommers, 60 Minn. 90, 61 N. W. 907; Hilands *v.* C., 111 Pa. 1, 2 Atl. 70.

enters a *nolle prosequi*, it is a final disposition of the case.[1]

If there is a hearing before a magistrate without a jury, jeopardy begins from the moment the magistrate enters upon the hearing of the evidence.[2]

When a party accused pleads guilty to a good indictment he has been in jeopardy, and cannot afterwards be tried on the same charge, even if he is not sentenced, or even if he is discharged after his plea of guilty.[3] But if the plea of guilty is afterwards withdrawn, there can, of course, be a trial on that or another indictment.[4]

If the accused is discharged before a trial is had, not having pleaded guilty, he has not been in jeopardy; and he may be prosecuted anew for the same crime. Therefore, if a *nolle prosequi* is entered on an indictment before trial it is no bar to future proceedings.[5] Nor does the mere pendency of another prosecution for the same offence (no trial having been had) constitute jeopardy; a defendant may be punished on a second indictment, pending the first.[6] And after a new trial has been granted, at defendant's request, on the former indictment, it may be abandoned and new proceedings begun.[7]

[1] Franklin *v.* S., 85 Ga. 570, 11 S. E. 876; Murphy *v.* S., 25 Neb. 807, 41 N. W. 792.

[2] C. *v.* Hart, 149 Mass. 7, 20 N. E. 310.

[3] Boswell *v.* S., 111 Ind. 47, 11 N. E. 788.

[4] Ledgerwood *v.* S., 134 Ind. 81, 33 N. E. 63

[5] O'Brien *v.* S., 91 Ala. 25, 8 So. 560; *Ex parte* Foss, 102 Cal. 347, 36 Pac. 669; Dye *v.* S., 130 Ind. 87, 29 N. E. 771; C. *v.* Galligan, 156 Mass. 270, 30 N. E. 1142; Dulin *v.* Lillard, 91 Va. 718, 20 S. E. 821.

[6] Kalloch *v.* Superior Court, 56 Cal. 229; S. *v.* Keena, 64 Conn. 212, 29 Atl. 470; C. *v.* Drew, 3 Cush. 279; S. *v.* Eaton, 75 Mo. 586.

[7] S. *v.* Freidrich, 4 Wash. 204, 29 Pac. 1055.

§ 80. **Where the former proceedings could not legally have led to conviction and punishment, there was no jeopardy, even if the prosecution proceeded to a verdict.** Thus there is no jeopardy by reason of prosecution in a court which had no jurisdiction to punish.[1] So where the former trial was had without arraignment and plea by the defendant, there was no jeopardy, and a new trial may be had.[2]

Where the indictment on which the former prosecution was based was insufficient, it has formerly been held that an acquittal upon it is not a bar to another prosecution.[3] In a well-reasoned case in the Supreme Court of the United States, however, it has lately been held that where there was a former acquittal *on the merits* there cannot be a subsequent trial though the former indictment was insufficient;[4] and the doctrine is likely to prevail. It has been adopted by statute in some States.[5] This doctrine does not apply where the acquittal was not on the merits, as where it was by direction of the court because of the defects in the indictment;[6] or where a *nolle prosequi* was entered, though without defendant's consent.[7]

[1] P. *v.* Hamberg, 84 Cal. 468, 24 Pac. 298; S. *v.* Jamison, 104 Ia. 343, 73 N. W. 831.

[2] Weaver *v.* S., 83 Ind. 289; S. *v.* Bronkol, 5 N. D. 507, 67 N. W. 680.

[3] Vaux's Case, 4 Co. 44; S. *v.* Smith, 88 Ia. 178, 55 N. W. 198; P. *v.* Barrett, 1 Johns. 66.

[4] U. S. *v.* Ball, 163 U. S. 662.

[5] C. *v.* Goulet, 160 Mass. 276, 35 N. E. 780; P. *v.* Harding, 53 Mich. 481, 19 N. W. 155; Croft *v.* P., 15 Hun 484; Mixon *v.* S., 35 Tex. Cr. R. 458, 34 S. W. 290.

[6] S. *v.* Littschke, 27 Or. 189, 40 Pac. 167.

[7] P. *v.* Ammerman, 118 Cal. 23, 50 Pac. 15.

Where the defendant was convicted and sentenced on the insufficient indictment, and performed the sentence, the offence is clearly merged, the defendant has been in jeopardy, and he cannot again be tried.[1] And the same rule has been followed, whether the sentence has or has not been executed.[2]

§ 81. **If after the beginning of the trial a necessity arises for stopping the trial, the court may discharge the jury, and the defendant may afterwards be tried again.**[3] Thus, if the jury after long deliberation is unable to agree upon a verdict, the court may order its discharge, and the defendant may be tried again.[4] So where a juror becomes ill or insane during the trial,[5] or so misconducts himself as to make a verdict void,[6] the jury may be discharged and a new trial had. The illness or death during the trial of a near relation of a juror, making him, evidently, unfit to serve, justifies his discharge in open court and a new trial.[7] So where it becomes known during the trial that a juror is disqualified, and the disqualification has not

[1] C. *v.* Loud, 3 Met. 328; Davis *v.* S., 37 Tex. Cr. R. 359, 39 S. W. 937.

[2] Fritz *v.* S., 40 Ind. 18.

[3] U. S. *v.* Shoemaker, 2 M'Lean 114.

[4] Winsor *v.* R., L. R. 1 Q. B. 289; Simmons *v.* U. S., 142 U. S. 148; P. *v.* James, 97 Cal. 400, 32 Pac. 317; Yarbrough *v.* C., 89 Ky. 151, 12 S. W. 143; C. *v.* Cody, 165 Mass. 133, 42 N. E. 575; P. *v.* Harding, 53 Mich. 481, 19 N. W. 155; P. *v.* Goodwin, 18 Johns. 187; Penn *v.* S., 36 Tex. Cr. R. 140, 35 S. W. 973. But see S. *v.* Ephraim, 2 D. & B. 162; McCreary *v.* C., 29 Pa. 328; Dye *v.* C., 7 Grat. 662.

[5] P. *v.* Ross, 85 Cal. 383, 24 Pac. 789; S. *v.* Reed, 53 Kan. 767, 37 Pac. 174; Davis *v.* S., 51 Neb. 301, 70 N. W. 984; De Berry *v.* S., 99 Tenn. 207, 42 S. W. 31.

[6] S. *v.* Hall, 4 Halst. (9 N. J. L.) 256.

[7] Hawes *v.* S., 88 Ala. 37, 60, 7 So. 302; Stocks *v.* S., 91 Ga. 831, 18 S. E. 847. See Upchurch *v.* S. (Tex. Cr. R.), 38 S. W. 206.

been waived, the jury may be discharged.[1] And so where the end of the term is reached before the jury finds a verdict.[2] The illness of the prisoner,[3] or of the judge, or even of the judge's wife,[4] will justify the discharge of the jury and a new trial.

In some jurisdictions it has been held that whether the discharge of the jury in the former trial was necessary is a question resting entirely in the discretion of the judge, not to be reviewed in another court.[5] In other States, however, the reasons for the discharge may be reviewed by a higher court, which will hold the former trial a bar to subsequent proceedings in case of an abuse of discretion by the lower court.[6] The reasons for the discharge of the jury should appear of record.[7]

§ 82. **Where the former proceedings are nullified at request of the defendant himself, they do not constitute such jeopardy as to prevent another trial.** Thus if the jury is discharged during the trial by the consent of the defendant, he may be tried by another jury;[8]

[1] Thompson *v.* U. S., 155 U. S. 271; S. *v.* Allen, 46 Conn. 531; S. *v.* Vaughan, 23 Nev. 103, 43 Pac. 193.

[2] S. *v.* McGuire, 53 Ia. 165, 4 N. W. 886.

[3] Meadow's Case, Fost. C. L. 76.

[4] S. *v.* Tatman, 59 Ia. 471, 13 N. W. 632.

[5] Winsor *v.* R., L. R. 1 Q. B. 289; U. S. *v.* Perez, 9 Wheat. 579; S. *v.* Tatman, 59 Ia. 471, 13 N. W. 632; C. *v.* Purchase, 2 Pick. 521; P. *v.* Harding, 53 Mich. 481, 18 N. W. 555, 19 N. W. 155; S. *v.* Reinhart, 26 Or. 466, 38 Pac. 822.

[6] Hawes *v.* S., 88 Ala. 37, 7 So. 302; S. *v.* Leach, 120 Ind. 124, 22 N. E. 111; C. *v.* Cook, 6 S. & R. 577.

[7] Conklin *v.* S., 25 Neb. 784, 41 N. W. 788; Hooper *v.* S. (Tex. Cr. R.), 42 S. W. 398; but see P. *v.* Greene, 100 Cal. 140, 34 Pac. 630.

[8] R. *v.* Deane, 5 Cox C. C. 501; Kinloch's Case, Fost. C. L. 16; C. *v.* Sholes, 13 All. 554; Stewart *v.* S., 15 Oh. S. 155; Moore *v.* S., 3 Heisk. 493.

but the fact that the defendant did not object to the discharge of the jury, not being asked to consent, does not establish consent.[1] So if by proceedings in error the judgment against the accused is arrested at his request, the verdict set aside and a new trial ordered, the accused may be tried again, and he cannot object on the ground that he is a second time being put in jeopardy;[2] and so where the verdict is set aside in the trial court because found on insufficient evidence.[3] If after the former verdict is set aside the prosecution chooses to file a new accusation, the defendant may be tried on the second indictment.[4]

If an erroneous verdict is set aside at the request of the accused, he may be tried again; so where the verdict was defective in not finding the necessary facts.[5] And where the verdict was irregular because rendered in the absence of defendant, and was

[1] S. *v.* Richardson, 47 S. C. 166, 25 S. E. 220.

[2] S. *v.* Bowman, 94 Ia. 228, 62 N. W. 759; S. *v.* Terreso, 56 Kan. 126, 42 Pac. 354; C. *v.* Green, 17 Mass. 515; C. *v.* Downing, 150 Mass. 197, 22 N. E. 912; McGinn *v.* S., 46 Neb. 427, 65 N. W. 46; P. *v.* Palmer, 109 N. Y. 413, 17 N. E. 213; S. *v.* Rhodes, 112 N. C. 857, 17 S. E. 164.

[3] See Hoffman *v.* S., 97 Wis. 571, 73 N. W. 51.

[4] P. *v.* Schmidt, 64 Cal. 260, 30 Pac. 814; Gannon *v.* P., 127 Ill. 507, 21 N. E. 525; C. *v.* Brown, 167 Mass. 144, 45 N. E. 1; P. *v.* Murray, 89 Mich. 276, 50 N. W. 995; P. *v.* Connor, 142 N. Y. 130, 36 N. E. 807; S. *v.* Friedrich, 4 Wash. 204, 29 Pac. 1055; Von Rueden *v.* S., 96 Wis. 671, 71 N. W. 1048. The second indictment may be found while the motion for a new trial is pending. Maines *v.* S., 37 Tex. Cr. R. 617, 40 S. W. 490.

[5] P. *v.* Chong, 94 Cal. 379, 29 Pac. 776 (*semble*); Garza *v.* S. (Tex. Cr. R.), 46 S. W. 242. *Contra* (a scandalous case, where the irregularity in the verdict was by defendant's request, but he was allowed to complain of the error, and was discharged from further proceedings on account of a jeopardy he had twice waived), U. S. *v.* Woodruff, 68 Fed. 536.

therefore set aside at his request, he may be tried again;[1] so where it was set aside because of separation of the jury.[2]

Where the verdict is defective, but the defendant consents that it be received and the jury discharged, he cannot secure exemption from another trial; and it seems that he will be deemed to consent to the discharge if he does not object to the reception of the verdict.[3]

Where a defendant is tried on an indictment containing several counts, and he is convicted on one only and acquitted on the others, if the conviction is set aside on his motion he can be tried on that count only on which the verdict was set aside at his request; as to the others he has not waived the defence of former jeopardy.[4] So where in a lower court a defendant is convicted on one only of several counts and appeals, he can be tried on appeal only on the count on which he was convicted.[5] So where on the first trial defendant was convicted on the first count and the second is withdrawn from the jury, and on the second trial was convicted on the second alone, there can be no further prosecution.[6] A charge of taking 1000 smelts is not a charge in 1000 counts;

[1] P. *v.* Perkins, 1 Wend. 91; Rose *v.* S., 20 Oh. 31.

[2] Nomaque *v.* P., 1 Breese 145 [109]. *Contra*, Hayes *v.* S., 107 Ala. 1, 18 So. 172.

[3] P. *v.* Curtis, 76 Cal. 57, 17 Pac. 941; P. *v.* Kerm, 8 Ut. 268, 30 Pac. 988.

[4] Bell *v.* S., 48 Ala. 684; S. *v.* Helm, 92 Ia. 540, 61 N. W. 246; P. *v.* Dowling, 84 N. Y. 478; Campbell *v.* S., 9 Yerg. 333; S. *v.* Hill, 30 Wis. 416. *Contra*, Lesslie *v.* S., 18 Oh. S. 390.

[5] S. *v.* Wood, 49 Kan. 711, 31 Pac. 786; C. *v.* Prescott, 153 Mass. 396, 26 N. E. 1005 (*semble*).

[6] Roland *v.* P., 23 Col. 283, 47 Pac. 269.

if in the court below the conviction was for taking 330, he may on appeal be convicted of taking 850.[1]

When upon an indictment for a greater crime defendant is found guilty of a less crime, the verdict operates as an acquittal of the greater. If then the verdict is set aside at his request, he has waived his former jeopardy only for the offence of which he was convicted, and he cannot again be tried for the greater crime.[2] In several States it is provided by statute that when a new trial is granted the parties shall be in the same position as if no trial had been held; and if a verdict is set aside it is held that the defendant may be tried again for the greater crime.[3] In a few jurisdictions this is held without a statute.[4]

In some States holding the general doctrine a distinction is drawn between conviction for a smaller crime and for a less degree of the same crime; and therefore if a conviction for murder in the second degree is reversed they allow conviction for murder in the first degree. There is, they say, but one crime.[5]

[1] C *v.* Prescott, 153 Mass. 396, 26 N. E. 1005.

[2] P. *v.* Gordon, 99 Cal. 227, 33 Pac. 901; Brennan *v.* P., 15 Ill. 511; Clem *v.* S., 42 Ind. 420; C. *v.* Herty, 109 Mass. 348; P. *v.* Knapp, 26 Mich. 112; S. *v.* Brannon, 55 Mo. 63 (altered by statute, Kring *v.* Missouri, 107 U. S. 221); Stuart's Case, 28 Grat. 950; S. *v.* Shear, 51 Wis. 460, 8 N. W. 287.

[3] Waller *v.* S., 104 Ga. 505, 30 S. E. 835; Veatch *v.* S., 60 Ind. 291; S. *v.* McCord, 8 Kan. 232; C. *v.* Arnold, 83 Ky. 1; Kring *v.* Missouri, 107 U. S. 221; P. *v.* Palmer, 109 N. Y. 413, 17 N. E. 213 (but see P. *v.* Cignarale, 110 N. Y. 23, 17 N. E. 135).

[4] S. *v.* Behimer, 20 Oh. S. 572; S. *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

[5] P. *v.* Keefer, 65 Cal. 232, 3 Pac. 818; S. *v.* Groves, 121 N. C. 563, 28 S. E. 262; Brigg's Case, 82 Va. 554.

§ 83. **If after a valid conviction the sentence is irregular, a second legal sentence may be pronounced without putting the prisoner again in jeopardy.**[1] Where the jury legally assessed punishment, but the judge erroneously ordered a new trial at which a greater punishment was assessed, while the new trial was of course void, the old verdict stood; defendant having, however, served the term of imprisonment fixed by the first verdict before attacking the second trial, was discharged.[2]

Where the sentence is void, but has been performed in whole or in part, it has been held that the defendant cannot again be sentenced, even where he is discharged on his own motion.[3] But these cases are inconsistent with a later decision of the Supreme Court of the United States;[4] and it would seem that if the defendant asks for a new sentence, he cannot object to receiving it.[5]

§ 84. **If a former conviction or acquittal was secured by the defendant's fraud, it is no bar to a subsequent prosecution.** So if he procured himself to be prosecuted in such a way as to secure a result favorable to himself, there has been no jeopardy.[6] This has usually been placed on the ground, perhaps not the

[1] *In re* Bonner, 151 U. S. 242; Roberts *v.* S., 30 Fla. 82, 11 So. 536; S. *v.* Smith, 6 Blackf. 549; Beale *v.* C., 25 Pa. 11; McDonald *v.* S., 79 Wis. 651, 48 N. W. 863. *Contra*, Bourne *v.* R., 7 A. & E. 58.

[2] S. *v.* Snyder, 98 Mo. 555, 12 S. W. 369.

[3] *Ex parte* Lange, 18 Wall. 163; Dunbar *v.* T. (Ari.), 50 Pac. 30.

[4] *In re* Bonner, 151 U. S. 242.

[5] S. *v.* Watson, 20 R. I. —, 39 Atl. 193.

[6] Ice *v.* S., 123 Ind. 590, 24 N. E. 682; S. *v.* Smith, 57 Kan. 673, 47 Pac. 541; C. *v.* Dascom, 111 Mass. 404; S. *v.* Little, 1 N. H. 257; McFarland *v.* S., 68 Wis. 400, 32 N. W. 226.

best one, that the proceedings are not binding on the State because it was not a party. And on the same ground it has been held, on the other hand, that where the State through the prosecuting attorney is party to the former proceedings, there cannot be another prosecution, though the result in the former case was obtained by bribery of the prosecuting attorney.[1] It has also been held that the mere fact that defendant was the real complainant in the former prosecution before the magistrate, and that the individual injured had no notice of the proceedings, would justify another prosecution without evidence of actual fraud.[2] So where the Court was induced by fraud to accept a plea of guilty for a less offence, it was held that judgment thereupon might be set aside and the defendant dealt with for the greater offence.[3]

[1] Shideler *v.* S., 129 Ind. 523, 28 N. E. 537, 29 N. E. 36.

[2] C. *v.* Alderman, 4 Mass. 477; S. *v.* Simpson, 28 Minn. 66, 9 N. W. 79. In Ohio, by statute, a magistrate has no jurisdiction in certain cases, unless the complaint is by the party injured. Hanaghan *v.* S., 51 Oh. S. 24, 36 N. E. 1072.

[3] P. *v.* Woods, 84 Cal. 441, 23 Pac. 1119.

PART II.

THE ACCUSATION.

CHAPTER IX.

THE FORMALITIES OF ACCUSATION.

§ 85. LIKE all judicial proceedings everywhere, a criminal prosecution must be founded upon a statement of the charge against the defendant. This might conceivably be either written or oral; it might be an informal statement of all facts known to the party complaining or supposed by him, or it might be the statement in a set form of such facts as are by the law deemed necessary, omitting all others.

The indictment was originally an oral and quite informal statement by the grand jury, taken down by the clerk of court from the lips of the foreman, and recorded on the court rolls. It contained a statement of the facts known to the jury, and of suspicions entertained by them or by their neighbors; in short, it stated the commission of a crime, and such facts and suspicions as caused them to present the defendant as guilty of the crime. In the time of Edward I. the jury was required by statute to make its presentments in writing,[1] and from that time the indictment

[1] 13 E. 1, st. 1, c. 13; 1 E. 3, st. 2, c. 17.

doubtless acquired a set, formal structure, modelled to a greater or less extent on the appeal,[1] a proceeding in which the greatest emphasis was laid on form.[2] The history of this process is obscure; but by the end of the fifteenth century, at least, the indictment had acquired the rigid form it has to-day.

Two causes have contributed to this process. The judges, favoring life in capital cases, took advantage of the slightest technical defect to discharge a defendant, and form therefore became, in the highest degree, essential. On account of this attitude of the courts toward indictments, pleaders in drawing indictments were careful to include all allegations which could by any possibility be deemed essential; if they were useless they would do no harm, if necessary, their omission would vitiate the indictment. Indictments therefore became filled with allegations which had been introduced from the sport, the stupidity, or the abundant caution of some pleader, and were retained because there was some risk in omitting and none in retaining them.

What is true of the indictment is also true of the other forms of accusation, the information and the complaint. For though it is occasionally said that the complaint, being a more informal document, need not possess all the technical requisites of the indictment, it is no doubt true that when the complaint is the basis of a prosecution it must contain all the elements which are legally necessary in an indictment. What is said in this and other chapters about the indictment applies also, therefore, to the informa-

[1] See *ante*, § 8.

[2] 3 Reeves Hist. Eng. Law, 2d ed. 132 (ch. xvi.).

tion, and to the complaint when it is the only formal accusation.

The accusation is, then, a written document, having a highly technical form; and it is the proper and safe course to adhere to established forms, unless these have been altered by statute.[1] "The *via trita*," said Lord Ellenborough, "is the safest."[2]

Criminal pleading, and to some extent the whole criminal law, have been brought into disrepute by the extremely nice points raised by counsel and allowed by the courts. "More offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence, and many heinous and crying offences escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villany and the dishonor of God."[3] Too great particularity in indictments is of no real advantage to a defendant, except as it may enable him to escape punishment by a mere technicality. Indeed, too minute particularity is often a distinct disadvantage. "It is an important principle that persons accused ought to be distinctly warned of the offence imputed; but the extreme care employed to obtain legal accuracy has sometimes the opposite effect of bewildering."[4] "An indictment only states the legal character of the offence, and does not profess to furnish the details and particulars. . . . To make the indictment more particular would only encourage formal objections."[5]

[1] C. *v.* Keefe, 9 Gray 290.

[2] R. *v.* Marsden, 4 M. & S. 164, 168.

[3] Lord Hale, in 2 Pleas of the Crown, 193.

[4] Lord Denman, in his "Memoirs," vol. ii. p. 448.

[5] Willes, J., in Mulcahy *v.* R., L. R. 3 H. L. 306, 321.

In many States statutes have been passed which result in a relaxation of the technical requirements of the common law. Common provisions are that an indictment shall be sufficient, in spite of imperfections of form, if the defendant is not prejudiced in his defence by such imperfections;[1] and that there shall be no acquittal because of an immaterial variance.[2] The statutes of each jurisdiction must be examined with care upon this point.

§ 86. **Errors and imperfections of form in the indictment which leave the meaning clear do not vitiate it.** Thus, though the handwriting is wretchedly bad, the indictment is valid, if the court can make out the meaning;[3] otherwise, as one court plaintively remarked, many indictments would be set aside.[4] It is not fatal to neglect the dotting of an *i* or the crossing of a *t*.[5] So erasures and interlineations do not vitiate an indictment;[6] and the place of the interlined words may be fixed by a caret.[7]

If there is any doubt as to the true reading of the indictment, it is to be solved by the court, not by the jury;[8] and, if possible, that reading will be chosen which will make the indictment sensible and valid.[9]

Bad spelling will not vitiate an indictment, if the

[1] Mass. Stat. 1899, c. 409, § 5; N. Y. Co. Crim. Pro. § 285.

[2] Mass. Stat. 1899, c. 409, § 4; N. Y. Co. Crim. Pro. § 293.

[3] Irvin *v.* S., 7 Tex. App. 109.

[4] McGee *v.* S. (Tex. Cr. R.), 46 S. W. 930.

[5] U. S. *v.* Hinman, Bald. 292, Fed. Cas. No. 15,370.

[6] C. *v.* Fagan, 15 Gray 194; Jones *v.* S., 99 Ga. 46, 25 S. E. 617. An erasure is, however, reprehensible. P. *v.* Carroll, 92 Cal. 568, 28 Pac. 600.

[7] R. *v.* Davis, 7 C. & P. 319.

[8] C. *v.* Davis, 11 Gray 4; C. *v.* Riggs, 14 Gray 376.

[9] Williams *v.* S., 3 Heisk. 376.

sense remains clear.[1] Clerical error which does not affect the sense is to be disregarded. So "Tebruary" has been read "February,"[2] and "Fayelville" has been held sufficient for "Fayetville."[3]

In the same way a mistake in punctuation, if the meaning remains clear, will not vitiate an indictment.[4] And a mistake of grammar is not fatal if the meaning is not obscured.[5] Thus the indictment will be good in spite of a confusion of number;[6] and a relative will be referred to such antecedent as the context indicates was intended, in spite of the technical rules of grammar.[7]

An error, however, which alters or obscures the sense, even if it is a mere slip of the pen, cannot be passed over. Thus where, by a clerical error in an indictment for murder, the act was alleged to have been done "of his malice aforesaid," the error has been held fatal.[8] So it has been held that "malice aforethou" is misleading, and cannot be taken to mean "malice aforethought;"[9] nor is it possible to take "larcey" for "larceny,"[10] nor "dwell-house"

[1] Grant *v.* S., 55 Ala. 200; Lefler *v.* S., 122 Ind. 206, 23 N. E. 154; Hutto *v.* S., 7 Tex. App. 44.

[2] Witten *v.* S., 4 Tex. App. 70.

[3] U. S. *v.* Hinman, Bald. 292, Fed. Cas. No. 15,370.

[4] C. *v.* Wright, 1 Cush. 46, 64 (*semble*).

[5] S. *v.* Turlington, 102 Mo. 642, 15 S. W. 141; Brown *v.* S., 28 Tex. App. 379, 13 S. W. 150.

[6] Jackson *v.* S., 88 Ga. 784, 15 S. E. 677; S. *v.* Parks, 61 N. J. L. 438, 39 Atl. 1023. *Contra*, S. *v.* Jones, 45 La. Ann. 1454, 14 So. 218.

[7] Miller *v.* S., 107 Ind. 152; Jeffries *v.* C., 12 All. 145.

[8] S. *v.* Green, 42 La. Ann. 644, 7 So. 793. *Contra*, Gates *v.* S., 95 Ga. 340, 22 S. E. 836.

[9] Griffith *v.* S., 90 Ala. 583, 8 So. 812.

[10] P. *v.* St. Clair, 56 Cal. 406.

for "dwelling-house."[1] But "bite of the ear of A" has been held sufficiently to allege that defendant did bite off the ear,[2] and "in manner material to the issue" has been read "matter," even though "manner" was evidently intended by the pleader.[3] The indictment must be in the English language. Therefore it has been held that the use of the usual mathematical signs instead of the words "degrees" and "minutes" is a fatal defect.[4] So the use of an abbreviation has been held to vitiate the indictment;[5] and where in an indictment a Chinese lottery ticket was to be described, and a photograph of the ticket was attached to the indictment instead of a translation of it, the indictment was held bad as not being in the English language.[6] On the other hand, the sign & was allowed to stand for "and;"[7] and a comma was allowed to supply the place of "and" where a murder was alleged to have been committed by "Columbus Hash, Rowan Hash."[8] Quotation marks on each side of certain words, however, were not allowed to supply the place of an allegation that the words thus quoted were the exact words used.[9]

In alleging a date, it is now usually held enough to state it in figures;[10] though formerly this was held

[1] Parker *v.* S. (Ala.), 22 So. 791.

[2] C. *v.* Shelby (Ky.), 38 S. W. 490.

[3] P. *v.* Hitchcock, 104 Cal. 482, 38 Pac. 198.

[4] S. *v.* Jericho, 40 Vt. 121.

[5] Lemons *v.* S., 4 W. Va. 755. This decision was perhaps required by the express language of the Constitution.

[6] P. *v.* Ah Sum, 92 Cal. 648, 28 Pac. 680.

[7] Pickens *v.* S., 58 Ala. 364; Brown *v.* S., 16 Tex. App. 245.

[8] Hash *v.* C., 88 Va. 172, 13 S. E. 398.

[9] C. *v.* Wright, 1 Cush. 46, 64.

[10] S. *v.* Rawson, 19 Conn. 292; S. *v.* Reed, 35 Me. 489; C. *v.*

bad. In all cases it is much better practice to write out the allegations at length, in English words, rather than to use signs, figures, or abbreviations.

Certain words of foreign origin have become so far English by use that they may be used in an indictment; such words are *alias*,[1] *Anno Domini*,[2] *employee*.[3]

Smith, 153 Mass. 97, 26 N. E. 436. In two States decisions that this is not sufficient (Finch *v.* S., 6 Blackf. 533; S. *v.* Berrian, 2 Zab. 1, 679) have been altered by statute. Hizer *v.* S., 12 Ind. 330; Johnson *v.* S., 2 Dutch. 313.

[1] Kennedy *v.* P., 39 N. Y. 245.

[2] S. *v.* Gilbert, 13 Vt. 647.

[3] Ritter *v.* S., 111 Ind. 324, 12 N. E. 501.

CHAPTER X.

THE MERELY FORMAL PARTS.

§ 87. **The caption of an indictment states the name and authority of the State, the name of the court, the venue, and the time of finding.**[1] The caption is, properly speaking, no part of the indictment. It is part of the record, however, and may be referred to in order to ascertain the facts it states;[2] but not being a sworn statement of the grand jury, its errors and omissions may be corrected and amended from other parts of the record,[3] unless the error is by statute a fatal one, as where the name of the State is omitted, contrary to the provisions of the Constitution.[4] Thus repugnancy between the caption and the body of the indictment is not fatal.[5]

[1] 2 Hawk. P. C. (8th ed.) ch. 25, sects. 118–128. The form of caption in Massachusetts is as follows: "Commonwealth of Massachusetts. Suffolk, to wit: At the Superior Court holden at Boston, within and for the county of Suffolk, for the transaction of criminal business, on the day of in the year of our Lord one thousand," etc. Mass. Stat. 1899, c. 409. In New York the caption is much abridged. "Court of of the county of . The People of the State of New York against A. B.," omitting the time. N. Y. Co. Crim. Pro. § 276.

[2] George *v.* P., 167 Ill. 417, 47 N. E. 741; C. *v.* Hines, 101 Mass. 33; Robinson *v.* C., 88 Va. 900, 14 S. E. 627.

[3] Rivers *v.* S., 144 Ind. 16, 42 N. E. 1021; S. *v.* Robinson, 85 Me. 147, 26 Atl. 1092; C. *v.* Hines, 101 Mass. 33.

[4] S. *v.* Hazledahl, 2 N. D. 521, 52 N. W. 315.

[5] S. *v.* Boss, 74 Ind. 80.

Again, since the caption is no part of the indictment, the name given in it to the offence is immaterial, and neither helps nor harms the charge made in the body of the indictment.[1]

§ 88. **The formal commencement is a recital that the following charge is presented by the grand jury on oath.**[2] It forms part of the indictment proper.[3]

The proper allegation is that the indictment is found on the oath of the jury; it is not fatal error, however, to allege that it was found on their oaths.[4] When, as is now permitted, some of the jurors make affirmation instead of swearing, the proper allegation is, "the jurors, etc., on their oath and affirmation present."[5] The commencement need not state the reason why the jurors affirmed instead of swearing, nor which one affirmed.[6] And if it erroneously alleges the indictment to have been found on oath, while one of the jurors affirmed, it is not an error that can be taken advantage of on a motion in arrest of judgment.[7]

§ 89. **An indictment must contain a formal conclusion alleging that the acts charged were against the peace of the State.** An indictment which omits this con-

[1] P. *v.* Eppinger, 105 Cal. 36, 38 Pac. 538; S. *v.* Gillett, 92 Ia. 527, 61 N. W. 169; S. *v.* Howard, 66 Minn. 309, 68 N. W. 1096; Watson *v.* S., 2 Wash. 504, 27 Pac. 226.

[2] "The jurors for the said Commonwealth on their oath present that," etc. Mass. Stat. 1899, ch. 409.

[3] P. *v.* Bennett, 37 N. Y. 117.

[4] C. *v.* Sholes, 13 All. 554; S. *v.* Norton, 3 Zab. 33.

[5] Memorandum, 9 C. & P. 78.

[6] Mulcahy *v.* R., L. R. 3 H. L. 306, 322; C. *v.* Fisher, 7 Gray 492. But see S. *v.* Harris, 2 Halst. 361.

[7] Bram *v.* U. S., 168 U. S. 532.

clusion will be quashed, unless made good by statute.[1] This conclusion is expressly required by the Constitution in some States; in such cases it is fatal error to omit it, and objection may be taken at any stage of the case.[2] In other States its omission is expressly permitted by statute,[3] or is made possible by the general provision that no advantage shall be taken of merely formal defects;[4] for the conclusion is evidently merely formal, "a mere rhetorical flourish, adding nothing to the substance of the indictment."[5] For this reason, a defendant is not prejudiced by the omission of the formal conclusion; and a statute permitting such omission is therefore constitutional.[6]

Where the offence was committed before the division of one State into two, but was indicted after the division, it must be stated as against the peace of the old State.[7] So in England, if a crime is committed before the death of a king, but indicted after the accession of his successor, it must be averred against the peace of the late king.[8]

§ 90. **If the offence is created by statute, the indictment must conclude "against the form of the statute"** as well as against the peace. Omission of the conclusion against the statute is fatal at common law.[9]

[1] Rice *v.* S., 3 Heisk. 215; Early *v.* C., 86 Va. 921, 11 S. E. 795; S. *v.* McClung, 35 W. Va. 280, 13 S. E. 654.

[2] Simpson *v.* S., 111 Ala. 6, 20 So. 572; Wright *v.* S., 37 Tex. App. 3, 35 S. W. 150; Nichols *v.* S., 35 Wis. 308, 311.

[3] Mass. Pub. Stats. c. 213, § 16.

[4] Frisbie *v.* U. S., 157 U. S. 160; Bolln *v.* S., 51 Neb. 581, 71 N. W. 444; S. *v.* Peters, 107 N. C. 876, 12 S. E. 74.

[5] Nichols *v.* S., 35 Wis. 308, 311.

[6] C. *v.* Freelove, 150 Mass. 66, 22 N. E. 435.

[7] Damon's Case, 6 Me. 148.

[8] 2 Hale P. C. 188.

[9] C. *v.* Cooley, 10 Pick. 37.

And if the offence is created by more than one statute, the proper conclusion is "against the form of the statutes," though a conclusion against the statute would hardly be held to vitiate the indictment.[1] If the offence is one against the by-law or ordinance of a town or city, it must conclude both against the form of the by-law or ordinance and against the form of the statute.[2] Where the prosecution is for a common-law offence, the nature of which is unchanged by statute, the indictment need not conclude against the statute, though a statute may increase or diminish the punishment. It is the offence, not the punishment, which is charged in the indictment.[3]

Since a criminal statute is a public law, known by the court without being pleaded, the rule of pleading requiring its averment seems to be anomalous. And as in the case of the conclusion against the peace, the omission of this conclusion is not a substantial defect, and does not vitiate the indictment under modern statutes.[4] The object of the conclusion against the statute was to inform the defendant that he was charged with a statutory rather than a common-law offence. The requirement, however, was never of any practical value, for to allege an offence "against the form of the statute" did not vitiate an indictment for a common-law offence, the false conclusion being rejected as surplusage.[5] Where, therefore, this conclusion is required in statutory offences, it is the

[1] S. *v.* Dayton, 3 Zab. 49.
[2] C. *v.* Gay, 5 Pick. 44.
[3] Williams *v.* R., 7 Q. B. 250.
[4] Mansfield, *Ex parte*, 106 Cal. 400, 39 Pac. 775.
[5] C. *v.* Hoxey, 16 Mass. 385.

practice to conclude against the statute in all offences: and such a conclusion consequently conveys no information to the defendant.

The courts have been disinclined to insist upon technical exactness of form in the conclusion. In place of "against the form of the statute," for instance, they have accepted "against the Act of Congress," [1] "against the Act of Assembly," [2] and "against the statute," [3] since those forms give sufficient information that the act is claimed to be in violation of a statute; "against the law," however, conveys no such information, and is insufficient in an indictment for a statutory crime.[4] The error was passed over, and an indictment supported, which alleged the offence to be "against the form of the statue;" [5] but a conclusion "ainst the peace" was held fatally defective.[6]

§ 91. **Certain words, called "words of art," must be used in an indictment when it is necessary to express certain ideas; no other words can take their place.** "No periphrasis or circumlocution whatsoever will supply those words of art which the law hath appropriated for the description of the offence." [7] Such words are *treasonably*, *feloniously*, *murdered*, *took*, *burned*.

Perhaps the most important application of this principle is the rule that all common-law felonies

[1] U. S. *v.* Smith, 2 Mas. 143.
[2] S. *v.* Tribatt, 10 Ire. 151.
[3] C. *v.* Caldwell, 14 Mass. 330.
[4] C. *v.* Stockbridge, 11 Mass. 279; S. *v.* Lowder, 85 N. C. 564.
[5] S. *v.* Dorr, 82 Me. 341, 19 Atl. 861.
[6] Bird *v.* S., 37 Tex. App. 408, 35 S. W. 382.
[7] 2 Hawk. P. C. ch. 25, sect. 55.

must be alleged to have been done feloniously.[1] In some jurisdictions the same rule is followed in statutory felonies.[2] But in other jurisdictions the word "feloniously" is not necessary in an indictment for an offence created by statute, unless that word is used in the statute as part of the definition of the offence.[3]

To determine whether an offence mentioned (as most offences are) in some statute is to be regarded as an offence created by statute, one must notice whether the statute defines the offence it names, or merely names it and regulates the punishment. The offence is to be regarded as a statutory one only if some statute enumerates the acts which constitute it.[4]

Statutes in some States have done away with the necessity for the use of "feloniously,"[5] or other words of art.

§ 92. **Other formal averments, once deemed necessary, are not now required.** Such are averments that the defendant was "moved by the instigation of the devil;" that his act was "to the great damage" of some one, or "of evil example," or "to the common nuisance,"[6] or "to the displeasure of God;" that it

[1] C. *v.* Scannel, 11 Cush. 547; S. *v.* Porter, 48 La. Ann. 1539, 21 So. 125. *Contra*, S. *v.* Griffin, 79 Ia. 568, 44 N. W. 813. In Iowa, however, all crimes are in strictness statutory.

[2] Stropes *v.* S., 120 Ind. 562, 22 N. E. 773; S. *v.* Norman, 136 Mo. 1, 37 S. W. 827; S. *v.* Shaw, 117 N. C. 764, 23 S. E. 246; Randall *v.* C., 24 Grat. 644.

[3] U. S. *v.* Staats, 8 How. 41; Bannon *v.* U. S., 156 U. S. 464; P. *v.* Rogers, 81 Cal. 209, 22 Pac. 592; Lyons *v.* P., 68 Ill. 271; Wagner *v.* S., 43 Neb. 1, 61 N. W. 85.

[4] Tully *v.* C., 4 Met. 357.

[5] C. *v.* Jackson, 15 Gray 187; Durand *v.* P., 47 Mich. 332.

[6] C. *v.* Haynes, 2 Gray 72; C. *v.* Reynolds, 14 Gray 87, 91; but see C. *v.* Harris, 101 Mass. 29.

was done "with force and arms;"[1] and that the victim was "in the peace of the State."[2] All such averments, conveying, as they do, no information either to court or to the accused, are unnecessary everywhere, and have been formally dispensed with by statute in most States.[3]

[1] S. *v.* Duncan, 6 Ire. 236.

[2] S. *v.* Robertson, 50 La. Ann. 456, 23 So. 510; C. *v.* Murphy, 11 Cush. 472.

[3] Mass. Stat. 1899, c. 409, sect. 3; N. Y. Co. Crim. Pro. § 285.

CHAPTER XI.

DESCRIPTIVE ALLEGATIONS IN GENERAL.

§ 93. Besides the merely formal parts, every indictment must contain a description of the offence with the commission of which the defendant is charged. If the defendant is finally convicted, the judgment against him is that he is guilty of the facts stated in the indictment; indeed, he can be dealt with by the court for those facts only, for it is a fundamental limitation of judicial power that it can be exercised only in matters formally brought into court by the complaining party. The defendant, then, can be punished only for the facts which have been brought before the court by the prosecuting party in the formal accusation.

In this respect the indictment is like the declaration. In civil cases also the plaintiff must recover upon the case stated in his declaration, and a judgment that goes beyond the declaration is void.[1] In both civil and criminal suits all necessary facts must be stated in the first pleading, and there is in fact no difference at common law between civil and criminal pleading.[2] The Statutes of Jeofails, however, which have permitted the court in certain cases to overlook mere errors of form, and to give judgment

[1] Reynolds *v.* Stockton, 140 U. S. 254.

[2] R. *v.* Lawley, 2 Stra. 904.

on the pleadings "as the very right shall appear,"[1] do not apply to criminal cases.[2] At the present time, therefore, formal errors might be fatal to an indictment which could not be taken advantage of, at least without a special demurrer, in a civil suit; but in substance there is no difference between the requirements of civil and those of criminal pleadings.

The object of an indictment is to state facts, not conclusions or rules of law. The court and the defendant, the parties for whose information the indictment is framed, know or are taken to know the law, and there is therefore no need of stating it. A conclusion or a presumption of law need not be averred in the indictment.[3]

§ 94. **Words and phrases in the indictment, when they have not acquired a technical legal meaning, will be interpreted according to ordinary use.** And in the absence of peculiar circumstances, words will be taken to have the same meaning in an indictment as in the statute on which the indictment is framed.[4] The language is sufficient if "there is no danger that the defendant, or the witnesses, or the jury, or the court will misunderstand it," and so where it was alleged that the defendant did cruelly beat a horse, it was held sufficiently to aver the infliction of blows on the horse, though it might possibly mean that he won in a race against the horse.[5] On the other hand,

[1] 27 Eliz. c. 5, § 1; 4 Ann. c. 16, § 1.

[2] 2 Hale P. C. 193.

[3] R. *v.* Smith, 2 B. & P. 127, Russ. & R. C. C. 5; Spalding *v.* P., 172 Ill. 40, 49 N. E. 993; C. *v.* Goulding, 135 Mass. 552; S. *v.* Whalen, 98 Mo. 222, 11 S. W. 576.

[4] C. *v.* King, 150 Mass. 221, 22 N. E. 905.

[5] C. *v.* McClellan, 101 Mass. 34.

"shoot with intent to commit murder upon" a certain person was held not to be a sufficient allegation that defendant shot the person; since "shoot upon him" might mean "stand upon him and shoot."[1]

If the sense be clear, nice exceptions ought not to be regarded.[2] "Even in considering the question of the validity of a criminal pleading," said an able judge, "one must have some regard to the ordinary interpretation of language, and apply some measure of common sense to its construction."[3]

§ 95. **The description of the offence must be certain, positive, and complete.** Each of these requirements must be fulfilled if the indictment is to be sustained. There must be no room for doubt that the defendant is by the accusation charged with doing certain acts; and the acts so charged must be sufficient to constitute a criminal offence. The defendant has a right to insist that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defence and protect himself after judgment against another prosecution for the same offence.[4]

The requisites of an indictment are in some States settled by the Constitution. Thus in Massachusetts the provisions of article 12 of the Bill of Rights secure to the accused person the right to have his crime or offence "fully and plainly, substantially and formally described to him." These provisions only require such particularity of allegation as may

[1] S. *v.* Charles, 18 La. Ann. 720. This is less sensible than ingenious.

[2] Lord Ellenborough, C. J., in R. *v.* Stevens, 5 East 244, 259.

[3] Lord Russell, C. J., in R. *v.* Jameson, [1896] 2 Q. B. 425, 429.

[4] Rosen *v.* U. S., 161 U. S. 29; West *v.* P., 137 Ill. 189, 27 N. E. 34; S. *v.* Startup, 39 N. J. L. 423, 432.

be of service to him, in enabling him to understand the charge, and to prepare his defence.[1]

§ 96. **No matter how clear the court may be as to the meaning the jury intended to convey, if they did not expressly state it the indictment is bad.** If a word essential to the sense is omitted, its place cannot be supplied by intendment.[2] Thus the omission of "did" has been held fatal, though the intention of the jury is clear.[3] Even in cases where it would seem quite possible to supply the missing word by interpretation, indictments have been held bad for omitting *of*[4] and *at*;[5] while on the other hand the omission of "away" has been held not fatal.[6]

If the indictment alleges in the disjunctive that one crime or another was committed, the indictment is uncertain and fatally defective.[7] It is, however, provided in some States by statute that different crimes of the same nature and subject to the same punishment may be charged in the alternative in a single count.[8] In this case each alternative must

[1] C. *v.* Robertson, 162 Mass. 90, 38 N. E. 25.

[2] U. S. *v.* Cruikshank, 92 U. S. 542.

[3] S. *v.* Graham, 49 La. Ann. 1524, 22 So. 807; S. *v.* Hutchinson, 26 Tex. 111; S. *v.* Daugherty, 30 Tex. 360.

[4] Riley *v.* S., 27 Tex. App. 606, 11 S. W. 642.

[5] S. *v.* Huston, 12 Tex. 245.

[6] S. *v.* Parry, 48 La. Ann. 1468, 21 So. 30. But see *contra*, C. *v.* Adams, 7 Gray 43.

[7] C. *v.* Perrigo, 3 Met. (Ky.) 5; C. *v.* Grey, 2 Gray 501; S. *v.* Green, 3 Heisk. 131. *Contra*, Morgan *v.* C., 7 Grat. 592 (where the point does not seem to have been considered), followed in Cunningham *v.* S., 5 W. Va. 508.

[8] Wickard *v.* S., 109 Ala. 45, 19 So. 491. Where the statute simply permits the means to be stated in the alternative, it does not justify stating separate offences in the alternative. Handaman *v.* S., 3 Heisk. 134 *n.*

be so stated that it would be sufficient if it stood alone.[1]

A word which ordinarily has a disjunctive meaning may sometimes be used conjunctively. Thus "or" may be used to introduce another word or phrase of the same meaning; having then the force of "that is" or "to wit." In that case there is no uncertainty about the charge; it is the same charge stated in different ways.[2]

Certain mediæval notions of certainty in pleading are adopted by Lord Coke,[3] and applied to criminal pleadings; as, that there are three degrees of certainty, to the second of which the indictment must attain. Such artificial distinctions are now of no assistance.[4]

§ 97. **Averments must be made positively and not by intendment or argument.**[5] Thus an allegation that defendant did an act while another person was under his care contains no averment that the other was in fact under his care;[6] an allegation that he took upon himself to do a certain thing is not an averment that he did it;[7] and an allegation that he neglected to provide a suitable pier on each side of a bridge he had been empowered to build does not aver that the bridge had been built.[8] So an allegation that "the

[1] Rogers *v.* S., 117 Ala. 192, 23 So. 82.

[2] Brown *v.* C., 8 Mass. 59; S. *v.* Brookhouse, 10 Wash. 87, 38 Pac. 862.

[3] Co. Lit. 303 *a*.

[4] See 1 Bish. New Crim. Pro. §§ 323, 325.

[5] C. *v.* Dean, 110 Mass. 64; Drake *v.* S., 19 Oh. S. 211; S. *v.* Koshland, 25 Or. 178, 35 Pac. 32; S. *v.* Jeter, 47 S. C. 2, 24 S. E. 889; Prophit *v.* S., 12 Tex. App. 233.

[6] R. *v.* Pelham, 8 Q. B. 959.

[7] S. *v.* Perry, 2 Bail. 17.

[8] C. *v.* Newburyport Bridge, 9 Pick. 142.

affidavit shows" that the facts of an offence are true is not positive, and the indictment is insufficient.[1]

An indictment of a railroad company for failure to keep open waiting-rooms must allege that there were waiting-rooms (even though they would be guilty of a crime if they had not provided such rooms);[2] an indictment against one as innholder for suffering persons to play at unlawful games in his inn must directly aver that he kept an inn;[3] an indictment for forging a release of liens for advances must aver that advances had been made;[4] an indictment for statutory rape by personating the woman's husband must allege that she had a husband.[5] So in an indictment for assisting in setting up a machine to be used in betting, it must be alleged that the machine was set up;[6] and in an indictment for conspiracy to resist an injunction, it must be alleged that defendant had been served with the injunction or knew of it.[7] On the other hand, it has been held that an allegation that one neglected to do an act sufficiently avers his ability to do it, since he could not neglect without ability to do.[8] An allegation of a sale of one pint is sufficient allegation of a sale less than five gallons;[9] and an allegation that defendant set fire to part of a house sufficiently charges setting fire to a house.[10]

[1] Thomas *v.* S., 12 Tex. App. 227.
[2] S. *v.* Cleveland, C. C. & S. L. Ry., 137 Ind. 75, 36 N. E. 713.
[3] C. *v.* Bolkom, 3 Pick. 281.
[4] Williams *v.* S., 90 Ala. 649, 8 So. 825.
[5] Payne *v.* S. (Tex. Cr. R.), 43 S. W. 515.
[6] C. *v.* Lansdale, 98 Ky. 664, 34 S. W. 17.
[7] Pettibone *v.* U. S., 148 U. S. 197.
[8] R. *v.* Ryland, L. R. 1 C. C. 99, 37 L. J. M. 10.
[9] S. *v.* Lavake, 26 Minn. 526, 6 N. W. 339.
[10] Lavelle *v.* S., 136 Ind. 233, 36 N. E. 135.

An averment may be sufficiently made by using the participial form, at least in matters merely descriptive, not constituting the gist of the charge,[1] though it is better to allege the facts directly. So tautology does not vitiate the indictment, if the meaning is left clear; "an animal of the female sex, of that species of animal known as cattle," is sufficient description of a cow.[2]

§ 98. **A general statement may be rendered more precise by a phrase introduced by a "videlicet."** In early pleading it was common to make an allegation general, and then limit it by a phrase beginning with "videlicet" or "scilicet" ("to wit" or "that is");[3] for instance "afterwards, *videlicet* on the first day of January." If an allegation is necessary, the fact that it follows a *videlicet* does not make it less effective;[4] and if it is unnecessary, it may be rejected as surplusage in cases where it is not descriptive. If it is a matter of description, however, it cannot be rejected, as it could not be if it were a direct allegation;[5] and it would seem, therefore, that in no case does any benefit result from the use of this form of statement.[6]

§ 99. **In spite of the general rule against averments by intendment or argument, certain words are allowed**

[1] R. *v.* Waverton, 17 Q. B. 562; P. *v.* Hamilton (Cal.), 32 Pac. 526; Palmer *v.* P., 138 Ill. 356, 28 N. E. 130.

[2] Nightengale *v.* S., 94 Ga. 395, 21 S. E. 221.

[3] 1 Chit. Crim. L. 176; 1 Bish. New Crim. Proc. § 406; C. *v.* Hart, 10 Gray 465.

[4] Phinney's Case, 32 Me. 440; S. *v.* Grimes, 50 Minn. 123, 52 N. W. 275.

[5] *Post*, § 112.

[6] See 1 Bish., New Crim. Proc. § 406.

so comprehensive a meaning as to do away with the necessity of averring acts. Thus the word "assault" sufficiently charges a criminal assault, without stating the acts done;[1] "adultery" sufficiently charges carnal knowledge;[2] "rape" or "ravish" sufficiently implies force on the part of the man and unwillingness on the part of the woman.[3] The employment of such a word is always enough to charge the facts indicated by it:[4] and a statute providing that a word may be used in an indictment to convey its full meaning is constitutional, as where it was provided that an allegation that one committed perjury should be enough to charge that he swore falsely.[5]

§ 100. **No allegation may be omitted, if without it a criminal offence would not be described.**[6] Thus if on a second offence the punishment is increased, in order to convict of a second offence the indictment must aver the first offence;[7] and an indictment for perjury must show all the requisites of the crime.[8] "If in order to support the charge it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to show that those acts, when they were committed, were done with a particu-

[1] Russell *v.* S., 52 Ark. 276, 12 S. W. 564; S. *v.* Bell, 26 Minn. 388, 4 N. W. 621.

[2] Helfrich *v.* C., 33 Pa. 68.

[3] P. *v.* Willett, 105 Mich. 110, 62 N. W. 1115.

[4] C. *v.* Davis, 11 Pick. 432.

[5] S. *v.* Corson, 59 Me. 137.

[6] U. S. *v.* Hess, 124 U. S. 483; McLaughlin *v.* S., 45 Ind. 338; P. *v.* Albow, 140 N. Y. 130, 35 N. E. 438; S. *v.* Brown, 3 Murph. 224.

[7] Evans *v.* S., 150 Ind. 651, 50 N. E. 820; C. *v.* Harrington, 130 Mass. 35.

[8] S. *v.* Mace, 76 Me. 64.

lar intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negatived, that negative must be alleged."[1]

The charge must be found within the descriptive part of the accusation. If an essential allegation is there omitted, its place cannot be supplied from the concluding statement which contains the grand jury's conclusions.[2] Thus where intent to defraud is necessary, its place cannot be supplied by the conclusion, "So the jurors say that the defendant obtained the goods with intent to defraud."[3]

§ 101. **Any merely descriptive fact may be stated in the indictment as unknown, if it is so.**[4] Thus in an indictment for murder the weapon may be stated as unknown;[5] and the name, either of a third person or of the defendant himself, may be so stated.[6] If the averment is untrue, that is, if the fact was known to the grand jury, there must be an acquittal on the ground of variance.[7] If the fact was in truth unknown, there is by the better opinion no variance, though the jury might easily have ascertained it.[8] The averment is that of the grand jury, and is not

[1] Brett, J. A., in R. *v.* Aspinall, 2 Q. B. D. 48, 56.

[2] S. *v.* Halder, 2 McCord 377.

[3] C. *v.* Dean, 110 Mass. 64.

[4] P. *v.* Bogart, 36 Cal. 245.

[5] Terry *v.* S. (Ala.), 23 So. 776; C. *v.* Holmes, 157 Mass. 233, 32 N. E. 6; S. *v.* Burke, 54 N. H. 92.

[6] *Post*, §§ 124, 125.

[7] S. *v.* Wiseback, 139 Mo. 214, 40 S. W. 946.

[8] Wells *v.* S., 88 Ala. 239, 7 So. 272; Terry *v.* S. (Ala.), 23 So. 776; C. *v.* Glover, 111 Mass. 395, 401; C. *v.* Coy, 157 Mass. 200, 32 N. E. 4. *Contra*, R. *v.* Stroud, 1 C. & K. 187; Kimbrough *v.* S., 28 Tex. App. 367, 13 S. W. 218.

disproved by evidence that the fact was known after the indictment but before trial.[1] It is sometimes provided that a fact thus known after indictment may be inserted in the record.[2]

§ 102. **If the language of a document is too obscene decently to be spread on the record, it is enough to describe it generally,** stating the reason for not giving it exactly;[3] and for the same reason an indecent picture need not be particularly described,[4] nor an indecent act too minutely charged.[5] Even language grossly abusive or scandalous need not be exactly set out.[6] The description, however, must be sufficient to point out what writing, picture, or act is meant;[7] and if a whole book is presented as obscene, the parts of it deemed to be obscene must be pointed out.[8]

DUPLICITY.

§ 103. **One offence only may be stated in a single indictment or count; if more than one offence is charged, the indictment is bad for duplicity.**[9] Two averments which seem to charge two offences may in reality be

[1] Cheek *v.* S., 38 Ala. 227.

[2] Mass. Stat. 1899, c. 409, § 8; N. Y. Co. Crim. Pro. § 277.

[3] Grimm *v.* U. S., 156 U. S. 604; C. *v.* Holmes, 17 Mass. 336; P. *v.* Girardin, 1 Mich. 90. *Contra* in England, where the exact language must be set out, in spite of its indecency. Bradlaugh *v.* R., 3 Q. B. D. 607.

[4] C. *v.* Sharpless, 2 S. & R. 91.

[5] C. *v.* Dill, 160 Mass. 536, 36 N. E. 472.

[6] Bryson *v.* S. (Tex. Cr. R.), 39 S. W. 365.

[7] C. *v.* Wright, 139 Mass. 382, 1 N. E. 411.

[8] C. *v.* McCance, 164 Mass. 162, 41 N. E. 133.

[9] S. *v.* Lund, 49 Kan. 209, 30 Pac. 518; S. *v.* Huffman, 136 Mo. 58, 37 S. W. 797. Duplicity is also a fault in a complaint. Tiedke *v.* Saginaw, 43 Mich. 64, 4 N. W. 627.

two ways of stating the same offence; in such a case, since one offence only is charged, the indictment is not double. Thus in burglary, a single breaking with intent to commit two felonies is but one crime, and charging a breaking with the two intents is not double.[1] The same is true of a conspiracy to commit two offences,[2] and of bringing liquor into town to sell and to have it sold.[3] So an indictment for murder is good which charges a killing by several means; a killing might be accomplished by the use of several means, and it would be a single offence.[4] Where two averments are made with the same meaning and for the same purpose, either of which would be sufficient alone, the indictment is not thereby rendered double; so an indictment is good which charges the accused with keeping a disorderly house to which lewd persons did resort;[5] and a place may properly be described as a public square and common public highway.[6]

If one of the charges is insufficiently stated, so that no conviction could legally be had for that crime on the indictment, it is to be disregarded as mere surplusage, and the indictment is not double.[7]

§ 104. **Where an offence created by statute may be committed in various ways, stated in the statute disjunc-**

[1] P. *v.* Hall, 94 Cal. 595, 30 Pac. 7; S. *v.* Fox, 80 Ia. 312, 45 N. W. 874.

[2] S. *v.* Sterling, 34 Ia. 443; S. *v.* Wilson, 121 N. C. 650, 28 S. E. 416 (*semble*).

[3] C. *v.* Igo, 158 Mass. 199, 33 N. E. 339.

[4] Andersen *v.* U. S., 170 U. S. 481; C. *v.* Macloon, 101 Mass. 1.

[5] S. *v.* De Ladson, 66 Conn. 7, 33 Atl. 531.

[6] S. *v.* Eastman, 109 N. C. 785, 13 S. E. 1019.

[7] P. *v.* Harrold, 84 Cal. 567, 24 Pac. 106; P. *v.* Aldrich, 104 Mich. 455, 62 N. W. 570; S. *v.* Knock, 142 Mo. 515, 44 S. W. 235.

tively, and the same punishment is named for the crime whether it is committed in one or in all of the ways named, it may be alleged to have been committed in more than one way. The various ways must be enumerated conjunctively; if they are stated disjunctively the indictment will be bad for uncertainty.[1] But if they are properly joined, the indictment is not double.[2] Thus an indictment may allege that defendant made and counterfeited certain notes,[3] that he set up and promoted an illegal exhibition,[4] or that he made and caused to be made a false instrument.[5]

But where the statute enumerates in one clause several acts, each of which may be set up as a distinct offence and separately punished, only one of these offences may be charged in a single count.[6] Whether distinct offences are or are not created is, of course, a question of interpretation in each case; where a separate penalty is provided for each of the acts, it is a clear case of distinct offences.[7]

§ 105. **When one offence forms part of another offence, so that it is necessary to aver the former in order to describe the latter, the indictment for the larger offence,**

[1] *Ante*, § 96.

[2] P. *v.* Thompson, 111 Cal. 242, 43 Pac. 748; Hobbs *v.* S., 133 Ind. 404, 32 N. E. 1019; C. *v.* Dolan, 121 Mass. 374; P. *v.* Clarke, 105 Mich. 169, 62 N. W. 1117; P. *v.* Altman, 147 N. Y. 473, 42 N. E. 180; C. *v.* Mentzer, 162 Pa. 646, 29 Atl. 720; Boldt *v.* S., 72 Wis. 7, 38 N. W. 177.

[3] S. *v.* Hastings, 53 N. H. 452. See S. *v.* Fidler, 148 Ind. 221, 47 N. E. 464.

[4] C. *v.* Twitchell, 4 Cush. 74. [5] Crain *v.* U. S., 162 U. S. 625.

[6] U. S. *v.* Burns, 54 Fed. 351; P. *v.* Cooper, 53 Cal. 647; P. *v.* Keefer, 97 Mich. 15, 56 N. W. 105; Smith *v.* S., 32 Neb. 105, 48 N. W. 823.

[7] S. *v.* Smith, 61 Me. 386.

though it avers the other, is not double.[1] This is necessarily so, otherwise it would be impossible to frame a valid indictment for the larger offence. Therefore an indictment is good which avers assault, battery, and imprisonment,[2] assault to rape and rape,[3] assault and shooting with intent to kill,[4] offering to sell and selling.[5] On this principle it has been held that an indictment for embezzlement is good which avers larceny.[6]

In some cases it has been said that where facts averred would be evidence to prove the offence charged, their averment does not render the indictment double though they might constitute a separate charge of crime. The averment of evidence is rejected as surplusage, and no conviction allowed upon it.[7] So an indictment for conspiracy to commit a crime and the commission of the crime has been upheld on the ground that the latter averment might be regarded as a mere averment of an overt act;[8] though in another case such an indictment was upheld on the better reason that the conspiracy being merged in the completed offence, the latter only was charged.[9]

[1] C. *v.* Harney, 10 Met. 422; Akin *v.* S. (Tex. App.), 12 S. W. 1101; Early *v.* C., 86 Va. 921, 11 S. E. 795.

[2] Francisco *v.* S., 24 N. J. L. (4 Zab.) 30.

[3] C. *v.* Hackett, 170 Mass. 194, 48 N. E. 1087; De Berry *v.* S., 99 Tenn. 207, 42 S. W. 31.

[4] S. *v.* Parker, 42 La. Ann. 972, 8 So. 473.

[5] C. *v.* Eaton, 15 Pick. 273.

[6] S. *v.* Harris, 106 N. C. 682, 11 S. E. 377.

[7] S. *v.* Hull, 83 Ia. 112, 48 N. W. 917. *Contra*, S. *v.* Jacques, 45 La. Ann. 1451, 14 So. 213.

[8] S. *v.* Ormiston, 66 Ia. 143, 23 N. W. 370.

[9] Hoyt *v.* P., 140 Ill. 588, 30 N. E. 315.

On this ground it has been attempted to explain the well-established rule, which must be regarded as anomalous, that in an indictment for burglary it is proper to aver a breaking and entering with intent to commit a certain felony and the actual commission of it; the commonest case being the charge of breaking and entering with intent to commit larceny, and committing it.[1]

§ 106. **It is important to determine whether an injury to two persons, or to different articles of property of the same person, constitutes a single crime.** In pursuing the civil remedy, two injured individuals must, of course, sue separately; and even if injured chattels are the property of a single individual, the declaration might contain separate counts for the distinct items of injury. In a prosecution for crime, however, the injured party is not the individual, but the State; and though the individual injuries may be several, it does not follow that there are several injuries to the State. If the safety or welfare of the State is but once infringed, there is but one offence, however great the number of individual injuries.

If there is but one offence, there should be but one count; and if part of the single offence is described and the defendant is brought to trial upon it, he cannot, afterwards, be brought in jeopardy for another part of the same offence. On the other hand, if the offences are separate, a trial for one of them is no bar to subsequent trial for another. It is

[1] Love *v.* P., 160 Ill. 501, 43 N. E. 710; C. *v.* Tuck, 20 Pick. 356; S. *v.* Nagel, 136 Mo. 45, 37 S. W. 821; Benton *v.* C., 91 Va. 782, 21 S. E. 495. And see S. *v.* Phipps, 95 Ia. 487, 64 N. W. 410. *Contra*, S. *v.* Robertson, 48 La. Ann. 1024, 20 So. 166.

therefore of great importance to determine whether the offence is single.

§ 107. **Where two individuals are injured by a single criminal act, there is but a single offence; but if two are injured, or even if one is twice injured, by successive and independent acts, there are two offences.**[1] Thus, where two individuals are struck and injured by the defendant by a single blow, there is but one criminal battery;[2] but where two individuals are struck at about the same time (as, for instance, in the same affray) by separate blows given by the defendant, there are two offences.[3] On the same principle, an indictment is not double which describes the larceny or embezzlement at the same time of several things belonging to a single owner,[4] or even to different owners,[5] though in the latter case it must clearly appear from the indictment that the goods were taken at the same time.[6]

On this principle it has been rightly held that where goods are taken at one time, even if the property of separate owners, their value may be added to make the offence grand larceny.[7] But where the goods

[1] See a full discussion of this principle in its relation to the defence of former jeopardy, *ante*, § 78.

[2] S. *v.* Damon, 2 Tyler 387.

[3] Greenwood *v.* S., 64 Ind. 250; P. *v.* Ochotski (Mich.), 73 N. W. 889.

[4] Reed *v.* S., 88 Ala. 36, 6 So. 840; S. *v.* Pierce, 77 Ia. 245, 42 N. W. 181.

[5] S. *v.* Warren, 77 Md. 121, 26 Atl. 500; P. *v.* Johnson, 81 Mich. 573, 45 N. W. 1119; Fulmer *v.* C., 97 Pa. 503; Alexander *v.* C., 90 Va. 809, 20 S. E. 782.

[6] Joslyn *v.* S., 128 Ind. 160, 27 N. E. 492.

[7] Monoughan *v.* P., 24 Ill. 340; Lacey *v.* S., 22 Tex. App. 657; Ackerman *v.* S. (Wyo.), 54 P. 288.

are taken at different times, though the property of the same owner, it would seem there can be no grand larceny made out by adding their values.[1]

Whether the goods are taken at the same or at different times is a question of fact. It has been held that two takings at an interval of two minutes constituted one act; but another, after an interval of half an hour, constituted a separate act.[2]

In other cases, also, an injury to two persons or things really constitutes a single crime. Thus it is proper to charge in a single count taking by a single act of robbery the goods of two owners;[3] cutting trees by the same act on different parcels of land;[4] forging at the same time a check and the indorsement upon it;[5] allowing a minor to play four games of pool at one time;[6] obstructing two highways by erecting a single post at the corner of them.[7]

On the other hand, examples of distinct acts which therefore constitute separate offences are committing two acts of adultery with the same person;[8] receiving from two persons goods separately stolen;[9] print-

[1] R. *v.* Shepherd, L. R. 1 C. C. 118. In two cases where goods were secreted by a servant at different times, but carried away together, it was held that the value of all the goods could be united. R. *v.* Jones, 4 C. & P. 217; S. *v.* Mandich (Nev.), 54 Pac. 516. If the cases can be supported, it must be upon the ground that there was a mere secreting but no taking until the final carrying away.

[2] R. *v.* Birdseye, 4 C. & P. 386.

[3] Clark *v.* S., 28 Tex. App. 189, 12 S. W. 729.

[4] S. *v.* Paul, 81 Ia. 596, 47 N. W. 773.

[5] Sprouse *v.* C., 81 Va. 374.

[6] Kiley *v.* S., 120 Ind. 65, 22 N. E. 99.

[7] Clift *v.* S., 6 Ind. App. 199, 33 N. E. 211.

[8] C. *v.* Fuller, 163 Mass. 499, 40 N. E. 764.

[9] C. *v.* Andrews, 2 Mass. 409.

ing libellous statements about the same person in the same newspaper on different days.[1]

In a few cases these principles are not followed, and it is held that an offence which consists in separate injuries to two individuals (like taking the property of two, or killing two), though committed by a single act, necessarily constitutes two crimes.[2]

§ 108. **Duplicity is a mere formal defect, and is cured by pleading over.** Objection for duplicity must be taken by demurrer.[3] If no demurrer is interposed, it is too late to raise an objection after pleading to the merits, and *a fortiori* after verdict.[4] Even if a demurrer or motion to quash is seasonably interposed, an election of the prosecuting attorney to proceed upon one charge only cures the defect.[5]

REPUGNANCY.

§ 109. **Where one material part of an indictment is repugnant to another the whole is void;**[6] "for the law will not admit of such nonsense and absurdities in legal proceedings, which, if suffered, would soon introduce barbarism and confusion. Also it takes off much from the credit of an indictment that those by whom it is found have contradicted themselves."[7]

[1] P. *v.* Jackman, 96 Mich. 269, 55 N. W. 809.

[2] P. *v.* Majors, 65 Cal. 138, 3 Pac. 597; Morton *v.* S., 1 Lea 498.

[3] P. *v.* Tower, 135 N. Y. 457, 32 N. E. 145; S. *v.* Jarvis, 18 Or. 360, 23 Pac. 251.

[4] Wiborg *v.* U. S., 163 U. S. 632; S. *v.* Ormiston, 66 Ia. 143, 23 N. W. 370; S. *v.* Wilson, 143 Mo. 334, 44 S. W. 722; Aiken *v.* S., 41 Neb. 263, 59 N. W. 888.

[5] Stamper *v.* C. (Ky.), 42 S. W. 915; C. *v.* Holmes, 119 Mass. 195. See S. *v.* Leavitt, 87 Me. 72, 32 Atl. 787.

[6] R. *v.* Harris, 1 Den. C. C. 461.

[7] 2 Hawk. P. C. ch. 25, sect. 62.

On this ground it has been adjudged that an indictment for selling iron with false weights and measures is void, not only because it is absurd to suppose that iron could be sold by measure, but also because it is repugnant and inconsistent that it should be so sold at the same time when it was sold by weight.[1] So where an indictment charged the stealing of twenty ten-dollar bank-bills, each of the value of twenty dollars, it was held bad for repugnancy.[2] But "if, where the sense may be ambiguous, it is sufficiently marked by the context, or other means, in what sense they are intended to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or being apparently so, is not accompanied by anything to explain or define them."[3] If any reasonably possible construction of the indictment will save the language from repugnancy, that construction will be adopted.[4]

Repugnancy in an immaterial matter, or in an allegation which may be rejected as surplusage, is not a defect.[5] And therefore, if part of an indictment contains an imperfect charge of a second offence, and is therefore rejected for surplusage, a repugnant allegation contained in it does no harm.[6]

[1] 2 Rol. Abr. 18.

[2] Jones *v.* S. (Tex. Cr. R.), 46 S. W. 250.

[3] R. *v.* Stevens, 5 East 244.

[4] R. *v.* Craddock, 2 Den. C. C. 31.

[5] Taylor *v.* S., 100 Ala. 68, 14 So. 875; Robertson *v.* C. (Va.), 26 S. E. 362.

[6] C. *v.* Pray, 13 Pick. 359.

SURPLUSAGE.

§ 110. An indictment, otherwise sufficient, is not vitiated because it includes immaterial and unnecessary words; these are rejected as surplusage, and need not be proved.[1] Elegance in pleading can only be attained by rigorously excluding all unnecessary allegations, and this should always be done; but unnecessary and redundant allegations never vitiate pleadings. *Utile per inutile non vitiatur.* It is therefore the safe course, in case of doubt, to include an allegation in the indictment, and it is the common practice to do so. Indictments have thereby become encumbered with a mass of rubbish which it seems impossible now to eliminate except by legislation.

If a misdemeanor is alleged to have been feloniously done, the allegation may be rejected as surplusage;[2] so where an offence is alleged to have been committed against the statute the allegation may be rejected if the offence is, in fact, one at common law.[3] Other examples of surplusage are an allegation in the indictment that should have been in the caption;[4] a scandalous epithet applied to defendant;[5] a needless allegation of a former commission of the same crime,[6] or of a former conviction of it;[7] that certain property

[1] P. *v.* Perez, 87 Cal. 122, 25 Pac. 262; S. *v.* Furney, 41 Kan. 115, 21 Pac. 213; P. *v.* Laurence, 137 N. Y. 517, 33 N. E. 547; Burdge *v.* S., 53 Oh. S. 512, 42 N. E. 594.

[2] S. *v.* Sparks, 78 Ind. 166; C. *v.* Squire, 1 Met. 258; S. *v.* Edwards, 90 N. C. 710.

[3] C. *v.* Hoxey, 16 Mass. 385; *ante*, § 90.

[4] Rose *v.* S., Minor 28.

[5] City of Butte *v.* Peasley, 18 Mont. 303, 45 Pac. 210.

[6] Hurlbutt *v.* S., 52 Neb. 428, 72 N. W. 471.

[7] S. *v.* Dorr, 82 Me. 341, 19 Atl. 861.

obtained by fraud was obtained in defendant's capacity as merchandise broker;[1] that a certain corporation was a municipal corporation (its nature being a matter of law);[2] that the injured person was of a certain age;[3] that goods illegally sold were delivered;[4] that the murder for which the indictment was found was committed in the attempt to rob.[5] And generally an unnecessary averment of mere evidence will be rejected as surplusage.[6]

Upon this general principle, where an indictment alleges the larceny of several articles, a conviction may be had, though some of the articles are insufficiently described,[7] or are not proved to have been taken;[8] where an obtaining of goods is alleged by several false pretences, it is enough to prove one;[9] where in an indictment for perjury several false statements are averred, conviction may be had on proof of one;[10] where an act is alleged to have been done with several intents, proof of one is enough.[11]

Independent statements of immaterial acts which are not crimes will not vitiate an indictment, and are rejected as surplusage; as in an indictment for disturbing public worship, that a particular indi-

[1] C. *v.* Jeffries, 7 All. 548, 571.
[2] Spalding *v.* P., 172 Ill. 40, 49 N. E. 993.
[3] S. *v.* Ean, 90 Ia. 534, 58 N. W. 898.
[4] S. *v.* Ball, 27 Neb. 601, 43 N. W. 398.
[5] S. *v.* Foster, 136 Mo. 653, 38 S. E. 721.
[6] S. *v.* Broughton, 71 Miss. 90, 13 So. 885.
[7] C. *v.* Eastman, 2 Gray 76; C. *v.* Johnson, 133 Pa. 293, 19 Atl. 402.
[8] Maloney *v.* S. (Tex. Cr. R.), 45 S. W. 718.
[9] C. *v.* Morrill, 8 Cush. 571.
[10] C. *v.* Johns, 6 Gray 274; Harris *v.* P., 64 N. Y. 148.
[11] R. *v.* Evans, 3 Stark. 35.

vidual was disturbed;[1] in an indictment for larceny of certain property, that the temporary use of other property was taken.[2]

§ 111. **An indictment otherwise insufficient will be cured if the vicious part can be rejected as surplusage.** Thus, a statement that would otherwise make the indictment repugnant may be eliminated.[3] So in an indictment for assault on one Keach, whereby, it was alleged, "the said Leach" was cruelly wounded, the whole clause concerning Leach was rejected and the repugnancy cured.[4] So where an instrument is set out by its tenor, but a wrong name is given to it, the name may be rejected as surplusage, and the indictment is not repugnant.[5] If one of the charges is so imperfectly stated that a conviction upon it could not be supported, it will be rejected as surplusage and the conviction sustained.[6] In this way duplicity may sometimes be cured.

§ 112. **When a material allegation is made unnecessarily precise by a too particular description, the descriptive averment cannot be separated and rejected, but must be proved as laid.**[7] Thus where a sheet was described as a woollen sheet, though the statement of material was unnecessary, the epithet must be proved to pro-

[1] Hull *v.* S., 120 Ind. 153, 22 N. E. 117.

[2] S. *v.* Darden, 117 N. C. 697, 23 S. E. 106.

[3] Trout *v.* S., 111 Ind. 499, 12 N. E. 1005; C. *v.* Pray, 13 Pick. 359.

[4] C. *v.* Randall, 4 Gray 36.

[5] P. *v.* Kemp, 76 Mich. 410, 43 N. W. 439; S. *v.* Haws, 98 Mo. 188, 11 S. W. 574 (*semble*).

[6] S. *v.* Tyler, 46 La. Ann. 1269, 15 So. 624; C. *v.* Pray, 13 Pick. 359; S. *v.* McClung, 35 W. Va. 280, 13 S. E. 654.

[7] Robertson *v.* S., 97 Ga. 206, 22 S. E. 974; S. *v.* Hesner, 55 Ia. 494, 8 N. W. 329. *Contra* (by statute), Goodall *v.* S., 22 Oh. S. 203.

cure a conviction;[1] so where a horse was needlessly described as a white horse;[2] logs as marked with a certain brand;[3] and a third party as "of Worcester,"[4] or as a widow.[5] So if money is needlessly described, the proof must correspond to the description.[6]

Whether an unnecessary allegation may be rejected as surplusage or must be proved as laid is not always easy to determine. If the allegation is an independent clause, it may always be rejected; if it is an adjectival phrase, or, at any rate, if it is a single adjective, and describes or qualifies a necessary part of the indictment, it cannot be separated from the word it modifies. It may therefore depend upon the mere form of statement whether the allegation may be rejected. Thus, if a horse is described as a white horse, it must be proved so; if the indictment names a horse which is white, the descriptive clause may be rejected. The reason for insisting on proof of the description is that otherwise the defendant would be misled to his harm; though the same reason would in many cases perhaps require proof of allegations rejected under the rule as surplusage.

As a result of this rule, it is highly important in framing an indictment to deal with descriptive allegations in a different way from that usually adopted in case of doubt, namely, to omit them.

Mere descriptive epithets cannot be rejected as

[1] Alkenbrack *v.* P., 1 Den. 80.
[2] Turner *v.* S., 3 Heisk. 452.
[3] S. *v.* Noble, 15 Me. 476.
[4] C. *v.* Stone, 152 Mass. 498.
[5] R. *v.* Deeley, 4 C. & P. 579, 1 Moo. C. C. 303.
[6] Vale *v.* P., 161 Ill. 309, 43 N. E. 1091.

surplusage even if they are introduced by a *videlicet*.[1] Thus where a certain liquor was described as "intoxicating liquor, viz. beer," it was held that the proof must be confined to beer;[2] and the allegation of "a missile, to wit, a stone," cannot be proved by showing that a stick was used.[3] On principle, it seems difficult to reconcile these cases with the general doctrine that an unnecessary and separable allegation may be rejected as surplusage.

AMENDMENTS.

§ 113. **An indictment cannot be materially amended.** Being a statement made upon the oath of the grand jury, it can be corrected only by the same body. It may, of course, be sent back for correction to the same jury that found it, but in correcting it the jury would, in substance, be finding a new indictment. If, therefore, the indictment proves to be untrue at the trial, there is no way of amending it.[4] Even if the defendant would not be prejudiced by the proposed amendment, as in case of a slight correction in the name of the party injured, it cannot be made.[5] By consent of the defendant, however, an indictment may be amended,[6] except, perhaps, an indictment for a capital offence.[7]

[1] *Ante*, § 98. See, however, Lynch *v.* S., 89 Ala. 18, 7 So. 829.

[2] S. *v.* Brown, 51 Conn. 1.

[3] C. *v.* McCarthy, 145 Mass. 575, 14 N. E. 643.

[4] *Ex parte* Bain, 121 U. S. 1; Patrick *v.* P., 132 Ill. 529, 24 N. E. 619; C. *v.* Child, 13 Pick. 198, 200; S. *v.* Sexton, 8 Hawks 184.

[5] S. *v.* Taylor, 49 La. Ann. 319, 21 So. 516; S. *v.* McCarty, 17 R. I. 370, 22 Atl. 282.

[6] Reynolds *v.* S., 92 Ala. 44, 9 So. 398 (statutory); S. *v.* McCarty, 17 R. I. 370, 22 Atl. 282.

[7] In C. *v.* Mahar, 16 Pick. 120, it was held in a capital case that

§ 114. **An information may at any time by leave of court be amended by the officer who drew it**; differing in that respect from an indictment.[1] Like an indictment it can only be amended by the officer on whose oath it was found; but an information filed by one prosecuting officer may be amended by his successor in the same office.[2] A complaint on oath of a town grand juror, according to the Vermont practice, can be amended only by him; and as he is not present officially in the appellate court, it cannot there be amended.[3]

§ 115. **In merely formal recitals the indictment may, probably without the aid of a statute, be amended to conform to facts stated in the record,**[4] such as the date of organization of the grand jury,[5] or the commencement of the term of court;[6] so an error in the indorsement may be amended to conform to the record.[7]

On the same principle, an information may be amended by another than the official on whose oath it was presented so as to allege that it was presented by the prosecuting attorney instead of by the grand jury;[8] and when trial is had in an appellate court

no amendment could be made by consent; *contra*, S. *v.* Faile, 43 S. C. 52, 20 S. E. 798.

[1] R. *v.* Wilkes, 4 Burr. 2527, 2569; S. *v.* McDonald, 57 Kan. 537, 46 Pac. 966; P. *v.* Case, 105 Mich. 92, 62 N. W. 1017; S. *v.* White, 64 Vt. 372, 24 Atl. 250.

[2] S. *v.* Meacham, 67 Vt. 707, 32 Atl. 494.

[3] S. *v.* Wheeler, 64 Vt. 569, 25 Atl. 434.

[4] S. *v.* O'Brien, 18 R. I. 105, 25 Atl. 910.

[5] Murphy *v.* S., 36 Tex. Cr. R. 24, 35 S. W. 174.

[6] S. *v.* Sutton, 65 Vt. 439, 26 Atl. 66.

[7] S. *v.* Anderson, 45 La. Ann. 651, 12 So. 737.

[8] S. *v.* Curtis, 44 La. Ann. 320, 10 So. 784.

on a copy of the original complaint, the copy may be amended to conform to the original.[1]

§ 116. **Statutes in many States permit amendments of indictments in cases where the defendant will not thereby be prejudiced.** Examples of statutory amendment are amendments of the defendant's name[2] or of the name of another,[3] of the statement of time,[4] or of some immaterial descriptive detail.[5] *A fortiori* an information may be amended in accordance with a statute.[6] A statute permitting amendment is constitutional, if the defendant is not really prejudiced thereby.[7]

BILLS OF PARTICULARS.

§ 117. **When the information conveyed by an indictment is so indefinite that the defendant is at loss to know what facts will be shown, and is therefore unjustly embarrassed in his defence, the court may order the prosecution to file a bill of particulars, containing a more specific charge.**[8] — This is not to supply a defect in the indictment; it is not strictly a right of the defendant

[1] C. *v.* Vincent, 165 Mass. 18, 42 N. E. 332.

[2] Harris *v.* P., 21 Col. 95, 39 Pac. 1084; Shiflett *v.* C., 90 Va. 386, 18 S. E. 838.

[3] S. *v.* Hall, 97 Ia. 400, 66 N. W. 725; P. *v.* Brown, 110 Mich. 168, 67 N. W. 1112; S. *v.* Oliver, 20 Mont. 318, 50 Pac. 1018; Baker *v.* S., 88 Wis. 140, 59 N. W. 570.

[4] S. *v.* Hamilton, 48 La. Ann. 1566, 21 So. 232; S. *v.* May, 45 S. C. 509, 23 S. E. 513.

[5] S. *v.* Jacobs, 50 La. Ann. 447, 23 So. 608.

[6] S. *v.* Spencer, 43 Kan. 114, 23 Pac. 159; P. *v.* Hamilton, 76 Mich. 212, 42 N. W. 1131; Jackson *v.* S., 91 Wis. 253, 64 N. W. 838.

[7] P. *v.* Johnson, 104 N. Y. 213, 10 N. E. 690. See S. *v.* Van Cleve, 5 Wash. 642, 32 Pac. 461.

[8] Rex *v.* Hodgson, 3 C. & P. 422; C. *v.* Davis, 11 Pick. 432, 435; C. *v.* Giles, 1 Gray 466; S. *v.* Pickett, 118 N. C. 1231, 24 S. E. 350.

in any case. The allowance of a bill of particulars even when the indictment is admitted not to convey precise information, is entirely in the discretion of the court.[1] If it is refused, the defendant's only remedy is to ask for a new trial because of surprise in the evidence.[2] The bill of particulars is often allowed in prosecutions for embezzlement, where the indictment itself conveys little information as to particulars of the charge.[3]

If there is a variance between the bill of particulars and the evidence, it is not a ground for acquittal, the bill not being part of the indictment; but the defendant may secure a postponement of the trial.[4] The bill of particulars is therefore more easily amended than the indictment itself, and an advantage is gained if it can be used to state doubtful details instead of stating them in the indictment.

The defendant, as well as the prosecution, may be compelled to furnish a bill of particulars, if the court deem it proper to order it. Thus in an indictment for libel, where by statute the truth of the libel is a defence, the defendant may be ordered to state whether he intends to set up truth in defence, and if so to furnish particulars of the facts on which he intends to rely; such particulars having been furnished, the defendant will be confined to them.[5]

A bill of particulars may supply lacking particu-

[1] Dunlop *v.* U. S., 165 U. S. 486.

[2] C. *v.* Wood, 4 Gray 11; C. *v.* Buccieri, 153 Pa. 535, 26 Atl. 228.

[3] R. *v.* Hodgson, 3 C. & P. 422; Thalheim *v.* S., 38 Fla. 169, 20 So. 938; C. *v.* Bennett, 118 Mass. 443; P. *v.* Hanaw, 107 Mich. 337, 65 N. W. 231.

[4] C. *v.* Davis, 11 Pick. 432, 435.

[5] C. *v.* Snelling, 15 Pick. 321.

larity in the indictment;[1] and by taking advantage of this fact, and giving an absolute right to a bill of particulars, indictments have been greatly simplified by statute in certain cases.[2]

[1] Rosen *v.* U. S., 161 U. S. 29; C. *v.* Dill, 160 Mass. 536, 36 N. E. 472; P. *v.* Hanaw, 107 Mich. 337, 65 N. W. 232; S. *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

[2] Rosen *v.* U. S., 161 U. S. 29; C. *v.* Dill, 160 Mass. 536, 36 N. E. 472; Mass. Stat. 1899, c. 409, §§ 10, 13, 14, 16, 24, 27.

CHAPTER XII.

NAME.

§ 118. **The name is the ordinary description of an individual, and is usually a sufficient description.** It was necessary anciently to add his trade or calling and his residence,[1] called *additions;* but that is no longer necessary in most States.[2] Even where two men are of the same name, it is sufficient to describe either by his name;[3] thus where both the prosecutor and the accused had the same name, each was properly described by his name alone.[4] In such a case the identity of the person to whom the evidence applies and the person named in the indictment is, as usual, to be left to the jury.[5]

Where father and son are of the same name, the common method of distinguishing them is by calling the son "junior." That epithet, however, forms no part of the name, and neither the insertion nor the omission of it is important.[6] So where a man was described as "W. R., the second of that name," and

[1] 4 Bl. Com. 306.

[2] S. *v.* Daniels, 49 La. Ann. 954, 22 So. 415.

[3] R. *v.* Peace, 3 B. & Ald. 579.

[4] Brown *v.* S., 28 Tex. Cr. R. 379, 13 S. W. 150.

[5] Johnson *v.* Ellison, 4 T. B. Mon. 526; Allen *v.* Ogden, 12 Vt. 9.

[6] Geraghty *v.* S., 110 Ind. 103, 11 N. E. 1; S. *v.* Dankwardt (Ia.), 77 N. W. 495; C. *v.* Perkins, 1 Pick. 388; P. *v.* Collins, 7 Johns 549; Steinberger *v.* S. (Tex. Cr. R.), 34 S. W. 617.

it was proved that he was commonly known as "W. R., junior," it was held to be no variance; since the real name, both stated and proved, was W. R.[1] Similarly, where a woman is described as the wife of a certain man, the description forms no part of the name.[2]

§ 119. **In some States, a middle name is not legally part of the name,** and to state or omit a middle name or initial wrongly is an immaterial error.[3] In these States it has even been held that if the middle name is wrongly given, or if the Christian names are transposed, the resulting variance between allegation and proof is not material, and does not make an acquittal necessary.[4] In Ohio, however, though the middle name may be omitted, if alleged it must be proved as laid.[5] In other jurisdictions a middle name is regarded as an integral part of the name, and its omission or a transposition of the Christian names is a fatal variance.[6]

§ 120. **It seems to be sufficient in most States to state the initials of the Christian names.**[7] Such an allegation of name is good on demurrer[8] or after verdict;[9]

[1] C. *v.* Parmenter, 101 Mass. 211.

[2] C. *v.* Lewis, 1 Met. 151.

[3] Tucker *v.* P., 122 Ill. 583, 13 N. E. 809; Ross *v.* S., 116 Ind. 495, 19 N. E. 451; P. *v.* Lake, 110 N. Y. 61, 17 N. E. 146; S. *v.* Tall, 43 Minn. 273, 45 N. W. 449.

[4] Timberlake *v.* S., 100 Ga. 66, 27 S. E. 158; Langdon *v.* P., 133 Ill. 382, 24 N. E. 874; Smith *v.* Ross, 7 Mo. 463.

[5] Price *v.* S., 19 Oh. 423.

[6] R. *v.* James, 2 Cox C. C. 227; S. *v.* Woodrow, 56 Kan. 217, 42 Pac. 714 (*semble*); C. *v.* Buckley, 145 Mass. 181, 13 N. E. 368.

[7] S. *v.* Flack, 48 Kan. 146, 29 Pac. 571.

[8] S. *v.* Cameron, 86 Me. 196, 29 Atl. 984.
S. *v.* Butler, 26 Minn. 90, 1 N. W. 821; Smith *v.* S., 8 Oh. 294.

and allegation of the full name and proof of the initials only is not a fatal variance.[1] So, ordinary abbreviations of names are sufficient.[2]

§ 121. **If a person has been commonly known by a name not his true or legal name, he may properly be described in the indictment by this common name.**[3] Whether the person has commonly been known by the name given is of course a question of fact for the jury.[4] As names are given to persons for the purpose of identifying them, it follows that, if a person is equally well known by either of two different names, either may be used where the purpose is merely that of pointing out the person intended.[5]

Naming a person by a common nickname instead of by his true Christian name is therefore not a misnomer;[6] and where one was called "Douglas, *alias* Dug Jones, whose true Christian name is unknown," the indictment was held bad for repugnancy, since the two names are really one, and there was no ignorance as to the name.[7] It has been held sufficient to name a married woman as "Mary, wife of" a certain man;[8] or as "Mrs. Charles Davis" (her husband's name), on proof that she was so known;[9] or even

[1] Little *v.* P., 157 Ill. 153, 42 N. E. 389.

[2] S. *v.* Kean, 10 N. H. 347.

[3] R. *v.* Gregory, 8 Q. B. 508; P. *v.* Plyler, 121 Cal. 160, 53 Pac. 553; S. *v.* Gordon, 56 Kan. 64, 42 Pac. 346; Taylor *v.* S., 27 Tex. App. 44, 11 S. W. 35.

[4] C. *v.* Warren, 167 Mass. 53, 44 N. W. 1073; Lott *v.* S., 24 Tex. App. 723, 14 S. W. 277.

[5] Gilfillan, C. J., in S. *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

[6] P. *v.* Armstrong, 114 Cal. 570, 46 Pac. 611; Hix *v.* P., 157 Ill. 382, 41 N. E. 862.

[7] Jones *v.* S., 63 Ala. 27.

[8] C. *v.* Gray, 2 Cush. 535.

[9] Davis *v.* S. (Tex. App.), 11 S. W. 647.

by her maiden name, if the defendant was not thereby misled;[1] and a divorced woman may be called by the name of her former husband, if she is still sometimes known by it.[2] Where a person is commonly known by more than one name, it is proper for the pleader to give them all, connected by the word "alias" or "alias dictus;" the order in which the names are given being immaterial.[3] In such a case it is sufficient to prove one of the names so given.[4]

§ 122. **If a corporation is named in an indictment, it should be called by its corporate name.** On the principle just stated, it would seem enough to call it by the name by which it is usually called, even if the legal name is different; and it has so been held in several cases.[5] In other cases, however, the slightest deviation from the legal name has been held fatal.[6] Thus in Illinois, where the name had been changed by statute, and the name as altered, which had been in common use for years, was given in the indictment, the court first held the statute by which the name had been changed unconstitutional, and

[1] Mathis *v.* C. (Ky.), 13 S. W. 360.

[2] Robinson *v.* C., 88 Ky. 386, 11 S. W. 210.

[3] Kennedy *v.* P., 39 N. Y. 245. [4] Evans *v.* S., 62 Ala. 6.

[5] Putnam *v.* U. S., 162 U. S. 687 ("National Granite State Bank," for "National Granite State Bank of Exeter"); Rogers *v.* S., 90 Ga. 463, 16 S. E. 205 ("Central Railroad and Banking Company," for "Central Railroad and Banking Company of Georgia"); C. *v.* Dedham, 16 Mass. 141 ("Town of Dedham," for "Inhabitants of the town of Dedham"); C. *v.* Jacobs, 152 Mass. 276, 25 N. E. 463 ("Warren Club," for "Warren Social Club").

[6] C. *v.* Pope, 12 Cush. 272 ("Boston & Worcester Railroad Company," for "Boston and Worcester Railroad Corporation"); McGary *v.* P., 45 N. Y. 153 ("Phœnix Mills Co.," for "The Phœnix Mills of Seneca Falls").

then pronounced the variance between the name given and the true legal name a fatal variance.[1]

It is not necessary to aver facts showing a legal incorporation, still less to allege the place of incorporation; it is enough simply to name the body as a corporation, and prove it a corporation in fact.[2]

§ 123. **The name should be given as at the time of the indictment.** If there has been an alteration of the name, as by marriage of a woman, or by a statute changing the name of a corporation, and the alteration was before the indictment, the new name should be given;[3] if the alteration was after indictment but before trial, the old name as given in the indictment is sufficient.[4]

§ 124. **If the name of the accused is unknown to the grand jury, he may be otherwise described.** Thus he may be indicted as an unknown person personally brought before the jury by the jailer.[5] If his surname is known, he may be indicted by it, with a statement that his Christian name is unknown.[6]

§ 125. **The name of a third person may be stated as unknown if it is not in fact known by the grand jury.**[7] The jury may add to the statement that the name is unknown some qualification, as that it is "sup-

[1] Sykes *v.* P., 132 Ill. 32, 23 N. E. 391 ("Merchants' Loan and Trust Company," for "Merchants' Savings Loan and Trust Company").

[2] Bailey *v.* S., 116 Ala. 437, 22 So. 918; S. *v.* Rue (Minn.), 75 N. W. 235; Braithwait *v.* S., 28 Neb. 832, 45 N. W. 247; Lucas *v.* S. (Tex. Cr. R.), 44 S. W. 825.

[3] Brown *v.* S., 115 Ala. 74, 22 So. 458; see Mathis *v.* C. (Ky.), 13 S. W. 360.

[4] C. *v.* Phillipsburg, 10 Mass. 78. [5] Anon., Russ. & Ry. 489.

[6] Wilcox *v.* S., 35 Tex. Cr. R. 631, 34 S. W. 958 (statutory).

[7] Durland *v.* U. S., 161 U. S. 306; Shockley *v.* S. (Tex. Cr. R.), 42 S. W. 972. See *ante*, § 101.

posed to be C. Mehan,"[1] or that the person was an infant child of A. B.[2] The name is sometimes given as "John Doe, whose other name is unknown." In a case where the person proved to be a woman, this description was attacked as false; the court, however, held it sufficient.[3]

The allegation that the name of a person was unknown, being descriptive, must be proved as stated;[4] and if the name was in fact known to the jury, the description cannot be proved, and the variance is fatal.[5] In some States, even if it was unknown in fact, there is held to be a fatal variance if the jury had information within their reach and could easily have discovered the name;[6] in others, the allegation is sufficiently proved if the jury was in fact ignorant, no matter what sources of information may have been open to them.[7]

§ 126. **If a name is given, it is not necessary to state that the person is a human being**: the name sufficiently alleges it.[8] So naming a person by a woman's name is a sufficient allegation that she is a woman,[9] even though she is called a "female."[10] And use of the

[1] Reese *v.* S., 90 Ala. 624, 8 So. 818.

[2] Puryear *v.* S., 28 Tex. App. 73, 11 S. W. 929.

[3] P. *v.* White, 116 Cal. 17, 47 Pac. 771.

[4] *Ante*, § 101.

[5] Sault *v.* P., 3 Col. App. 502, 34 Pac. 263; S. *v.* Wiseback, 139 Mo. 214, 40 S. W. 946.

[6] R. *v.* Stroud, 1 C. & K. 187; Blodget *v.* S., 3 Ind. 403; Kimbrough *v.* S., 28 Tex. App. 367, 13 S. W. 218.

[7] Wells *v.* S., 88 Ala. 239, 7 So. 272; C. *v.* Glover, 111 Mass. 395, 401.

[8] P. *v.* McNulty, 93 Cal. 427, 26 Pac. 597; Palmer *v.* P., 138 Ill. 356, 28 N. E. 130.

[9] S. *v.* Smith, 18 Ind. App. 472, 47 N. E. 685.

[10] S. *v.* Hemm, 82 Ia. 609, 48 N. W. 971.

pronoun "his" points out the named person to whom it refers as a man, though the name is not distinctively masculine, the Christian name being given by initial only.[1]

§ 127. **If a name is incorrectly given, it is nevertheless sufficient if the name given has the same sound as the true name, or, in the ordinary phrase, if it is "idem sonans."**[2] The only important difference is one in sound, since the indictment is read to the accused, not read by him; and he is therefore not misled if the sound is right. Where the mistake is merely a slip in spelling which would make no difference in the sound, the indictment is obviously good;[3] and where the difference is more than a mere error in spelling, if the two words have evidently the same sound there is no variance.[4] If the sounds appear to the court obviously not identical they will hold that there is a variance without requiring evidence.[5] Where the identity of sound is possible, but not certain, the question of *idem sonans* is to be left to the jury.[6] In

[1] Slawson *v.* S. (Tex. Cr. R.), 45 S. W. 575.

[2] P. *v.* Hilderbrand, 71 Mich. 313, 38 N. W. 919; S. *v.* Collins, 115 N. C. 716, 20 S. E. 452.

[3] McNicole for McNicoll, R. *v.* Wilson, 2 C. & K. 527, 2 Cox C. C. 426; Faust for Foust, Faust *v.* U. S., 163 U. S. 452; Rooks for Rux, Rooks *v.* S., 83 Ala. 79, 3 So. 720; Horick for Horrick, Evans *v.* S., 150 Ind. 651, 50 N. E. 820.

[4] Whyneard for Winyard, R. *v.* Foster, Russ. & Ry. 412; Danner for Dannaher, Gahan *v.* P., 58 Ill. 160; Amel for Amiel, and Brearly for Brailey, P. *v.* Gosch, 82 Mich. 22, 46 N. W. 101; Lawson for Lossene, S. *v.* Pullens, 81 Mo. 387; Bolden for Bolen, Pitsnogle *v.* C., 91 Va. 808, 22 S. E. 351 (*semble*).

[5] M'Cann for M'Carn, R. *v.* Tannet, Russ. & Ry. 351; Shakespeare for Shakepeare, R. *v.* Shakespeare, 10 East 83; Raglin for Ragsley, Mindex *v.* S. (Tex. Cr. R.), 38 S. W. 995.

[6] Darius and Tryus, R. *v.* Davis, 5 Cox C. C. 237; Munkers and

that case, evidence may be introduced on the point,[1] as, for instance, that the person named had formerly pleaded to an indictment in which he was so named; the evidence, however, not being conclusive.[2] When, however, the question is as to the admissibility in evidence of a document set out in the indictment, and a variance appears, the question of *idem sonans*, like all questions of fact incidental to the admission of testimony, is to be determined, even if doubtful, by the court.[3]

§ 128. **The effect of misnomer is different, according as the name is that of the defendant or of a third person.** Rightly naming the defendant is necessary only that he may be able to protect himself easily against a second prosecution for the same offence; the true name is not necessary even in this case, for if he has been formerly prosecuted under the wrong name, he is entitled to show that fact. The correct statement of his name gives him no information of value in preparing his defence.

The name of a third person, on the other hand, if it occurs properly in an indictment, is inserted as part of the description of the offence. The true description is necessary to the defendant in preparing his defence, and if he has been deceived by a false description he is prejudiced in defending himself.

Moncus, Munkers *v.* S., 87 Ala. 94, 6 So. 357; Choy Fong and Toy Fong, P. *v.* Fick, 89 Cal. 144, 26 Pac. 759; Celeste and Celestia, C. *v.* Warren, 143 Mass. 568, 10 N. E. 178; Gervais and Jefferds, C. *v.* Brigham, 147 Mass. 414, 18 N. E. 167; Fraude and Freude, Weitzel *v.* S., 28 Tex. App. 523, 13 S. W. 864.

[1] C. *v.* Jennings, 121 Mass. 47.

[2] C. *v.* Brigham, 147 Mass. 414, 18 N. E. 167.

[3] Agee *v.* S., 113 Ala. 52, 21 So. 207.

In short, an error in the defendant's own name does not prejudice him at his trial; an error in the name of a third person does so prejudice him. It follows that

§ 129. **If a third person is misnamed in the indictment the variance is fatal;**[1] but if the accused is misnamed he must seasonably object, by a plea in abatement, in which he must state his correct name, so that if the indictment is abated a new one can at once be drawn, naming him correctly.[2] It is too late for a defendant to plead his own misnomer in abatement after he has pleaded to the merits.[3] By a common statute or practice, the true name is inserted in the indictment, when discovered, by amendment without abatement.[4]

It is in a few States provided by statute that variance in the name of a third person shall not be held fatal if the defendant is not prejudiced thereby; and such a statute is constitutional.[5]

§ 130. **Where there is a variance as to name between different parts of the indictment, or between complaint and information, whether the variance will be held fatal depends upon whether it is merely formal, leaving no doubt as to the identity of the descriptions.** Thus where the name is correctly given in an indictment, and afterwards the Christian name is incorrectly

[1] R. *v.* James, 2 Cox C. C. 227; S. *v.* Reynolds, 106 Mo. 146, 17 S. W. 322; C. *v.* Gillespie, 7 S. & R. 469; Collins *v.* S., 43 Tex. 577.

[2] Henderson *v.* S., 95 Ga. 326, 22 S. E. 537.

[3] Grimes *v.* S., 105 Ala. 86, 17 So. 184; C. *v.* Fredericks, 119 Mass. 199; Henry *v.* S. (Tex. Cr. R.), 42 S. W. 559.

[4] Maloney *v.* Traverse, 87 Ia. 306, 54 N. W. 155; N. Y. Co. Crim. Pro. § 277.

[5] C. *v.* Hall, 97 Mass. 570.

stated, but the person is referred to as "aforesaid," it is held that the variance is immaterial; the repetition of the Christian name being immaterial,[1] it will be rejected as surplusage.[2] But a variance in the surname, if necessarily stated, is fatal, as where a woman was first spoken of as "Eliza Ann Prichard," and later as "the said Eliza Ann Ferguson."[3]

A variance between complaint and information, even in the Christian name,[4] is necessarily fatal, since it makes it doubtful whether the offence charged by the complainant is the offence now charged.[5] A variance between pleading and proof is fatal if the identity is thereby rendered doubtful;[6] but where the name of a person injured was "one Pennington," and the proof was of his name as "A. G. Pennington," it was held no material variance.[7]

[1] C. *v.* Clapp, 16 Gray 237.

[2] Drake *v.* S., 145 Ind. 210, 41 N. E. 799; C. *v.* Robinson, 165 Mass. 426, 43 N. E. 121; Wampler *v.* S., 28 Tex. App. 352, 13 S. W. 144.

[3] Prichard *v.* P., 149 Ill. 50, 36 N. E. 103. See C. *v.* Randall, 4 Gray 36.

[4] Juniper *v.* S., 27 Tex. App. 478, 11 S. W. 483.

[5] P. *v.* Christian, 101 Cal. 471, 35 Pac. 1043.

[6] S. *v.* McCormick, 141 Ind. 685, 40 N. E. 1089; S. *v.* Quinlan, 40 Minn. 55, 41 N. W. 299.

[7] P. *v.* Arras, 89 Cal. 223, 26 Pac. 766. See P. *v.* Main, 114 Cal. 632, 46 Pac. 612.

CHAPTER XIII.

INDUCEMENT AND INTENT.

§ 131. It is necessary to distinguish between allegations inserted for the purpose of describing the very act which constitutes the crime itself (called the *gist*) and allegations of prior facts, a knowledge of which is necessary to understand the *gist*. This introductory matter, thus necessary to explain and elucidate the principal matter, is called the inducement.

§ 132. **All matters of inducement which are necessary in order to show that the act charged is a criminal offence must be stated.** So in an indictment for an offence against the "local option" liquor law, the passage of the law in the place where the offence is laid must be alleged.[1] On an indictment for violation of a city ordinance, the passage of the ordinance must be alleged, and its terms set out.[2] Where one is charged with an offence, and it is intended to inflict an increased punishment on the ground that it is a second or third offence, the former convictions must be alleged. It has been held not enough to allege that "this is a third offence."[3] But if a conviction in a certain court at a certain term is averred, a

[1] Alford *v.* S., 37 Tex. Cr. R. 386, 35 S. W. 657.
[2] Cunningham *v.* Berry, 17 Or. 622, 22 Pac. 115.
[3] P. *v.* Buck, 109 Mich. 687, 67 N. W. 982.

mistake in the actual date is immaterial;[1] and the former offence need be described only by name, not with particularity.[2]

In adultery it is necessary to allege that the parties are not married to each other;[3] and the same is true in fornication.[4] It is enough to state that either party was married to a person not the other,[5] or to a person of a different name from the other.[6]

A common example of a necessary inducement is in the action for libel, where all facts necessary for a full understanding of the libellous words must be stated in this way.[7] Other common examples are the allegations of the occasion and the administration of the oath, in the indictment for perjury;[8] and in the indictment for embezzlement the allegation of relationship between the parties.[9]

§ 133. **Introductory matter not necessary to prove the principal matter criminal need not be stated.** So an information need not allege facts necessary to jurisdiction, as the filing of an affidavit[10] or other condition to the legality of proceeding by information.[11] So where a married man can be prosecuted for adultery only on complaint of his wife, an indictment for adultery need not state either that the man was unmarried or that his wife had complained.[12] So

[1] S. *v.* Waters, 144 Mo. 341, 46 S. W. 173.
[2] S. *v.* Zimmerman, 83 Ia. 118, 49 N. W. 71.
[3] Moore *v.* C., 6 Met. 243. [4] C. *v.* Murphy, 2 All. 163.
[5] C. *v.* Tompson, 2 Cush. 551.
[6] Crane *v.* P., 168 Ill. 395, 48 N. E. 54; C. *v.* Reardon, 6 Cush. 78; Helfrich *v.* C., 33 Pa. 68.
[7] *Post*, § 181. [8] *Post*, § 183. [9] *Post*, § 194.
[10] Weisbrodt *v.* S., 50 Oh. S. 192, 33 N. E. 603.
[11] S. *v.* Munson, 7 Wash. 239, 34 Pac. 932.
[12] S. *v.* Mahan, 81 Ia. 121, 46 N. W. 855.

where an offence cannot be prosecuted by indictment unless no justice of the peace has taken cognizance of the offence for six months, it is not necessary in the indictment to state this jurisdictional fact.[1] Nor is it necessary to negative in the indictment facts which might except defendant from jurisdiction.[2]

In an indictment for rape or attempted rape it is not necessary to state the age of the person assaulted to prove her over the age of consent,[3] nor the age of the defendant to show him capable.[4] Nor is it necessary to allege that the victim was not defendant's wife.[5]

§ 134. **Matters of inducement may be alleged without great particularity.** It is not necessary to state merely introductory matter with the same certainty required for a statement of the gist. So where it is necessary to charge by way of inducement the legality of some act, it is enough to aver that it was done duly or in accordance with law. Thus in an indictment for disobeying an order of the justices, it is enough to aver that the order was duly made;[6] and in an indictment for making a false entry in an official report, it is enough to allege that the report was made in accordance with law, without setting out the facts to show compliance with the law.[7] In

[1] S. *v.* Kerby, 110 N. C. 558, 14 S. E. 856.

[2] U. S. *v.* Demarchi, 5 Blatch. 84.

[3] C. *v.* Sugland, 4 Gray 7; Bowles *v.* S., 7 Oh. (Part 2) 243; S. *v.* Haddon, 49 S. C. 308, 27 S. E. 194.

[4] P. *v.* Wessel, 98 Cal. 352, 33 Pac. 216.

[5] P. *v.* Estrada, 53 Cal. 600; S. *v.* Williams, 9 Mont. 179, 23 Pac. 335.

[6] R. *v.* Bidwell, 1 Den. C. C. 222.

[7] Cochran *v.* U. S., 157 U. S. 286.

an indictment for failing to support the defendant's wife, it is enough to allege that she is his wife, without setting out the marriage.[1] In an indictment against a constable for failing to return a warrant, the issuing of the warrant is inducement, and may be merely recited without detail;[2] and an indictment for hindering a duly summoned witness from attending court need not set out at length the process of summoning the witness.[3]

INTENT.

§ 135. **It is not necessary to state an intent to do the acts charged, as a statement that defendant did the acts is sufficient.** It is equivalent to an allegation that he did them in such a way as to be accountable; and if by reason of infancy, insanity, mistake, or otherwise he is not accountable for his acts, he may show that fact, and the prosecution will not obtain a verdict. It is therefore not necessary to allege that defendant intended to do the acts that he is charged with doing, where those acts, without other circumstances, constitute the offence.[4] As it is ordinarily stated, when the doing of an act is alleged, it is presumed that the act was intentionally done.

So in the case of a common-law crime it is not

[1] S. *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787.

[2] R. *v.* Wyatt, 2 Ld. Raym. 1189.

[3] C. *v.* Reynolds, 14 Gray 87.

[4] Scott *v.* P., 141 Ill. 195, 30 N. E. 329; S. *v.* B. O. & C. R. R., 120 Ind. 298, 22 N. E. 307; C. *v.* Hersey, 2 All. 173. This principle was wrongly invoked in the case of an offence involving a specific intent, where a statute provided that the intent should be presumed, the burden being on defendant to produce evidence in disproof. It is clear the intent should have been alleged. Linbeck *v.* S., 1 Wash. 336, 25 Pac. 452.

necessary to charge that an act was done unlawfully.[1] It may be advisable to use the word, however, in indicting for a statutory crime, when the word is contained in the statute.[2]

§ 136. **When the definition of a crime includes a specific state of mind or specific intent, such intent must be alleged in the indictment.**[3] The distinction between a required specific intent and the general intent dealt with in the preceding section is this. The general intent, required in all crimes, is an intention to do the act done; and there is no need of an independent averment of it, since it would be naturally understood. The specific intent is some independent mental element which must accompany the physical act in order that the crime in question may be committed; it is an element of many but not of all crimes. An allegation of the act alone would not sufficiently charge such a crime; and it is therefore imperative that the specific intent should be explicitly stated. On this principle, if the offence must be done maliciously,[4] wilfully,[5] or knowingly,[6] the malice, intention, or knowledge must be expressly averred. It is sufficient, however, if it is averred in equivalent language, which necessarily involves the required intent. Thus "feloniously" sufficiently

[1] Hall *v.* S., 28 Tex. App. 146, 12 S. W. 739; Barnard *v.* S., 88 Wis. 656, 60 N. W. 1058.

[2] See *infra*, § 198.

[3] P. *v.* Smith, 103 Cal. 563, 37 Pac. 516; S. *v.* Daniels, 90 Ia. 491, 58 N. W. 891; S. *v.* Insley, 64 Md. 28, 20 Atl. 1031; P. *v.* Lowndes, 130 N. Y. 455, 29 N. E. 751.

[4] Maxwell *v.* S., 68 Miss. 339, 8 So. 546.

[5] S. *v.* Day, 100 Mo. 242, 12 S. W. 365.

[6] S. *v.* McDonough, 84 Me. 488, 24 Atl. 944; C. *v.* Flannelly, 15 Gray 195.

avers that the act was done unlawfully,[1] with intent to steal,[2] or wilfully,[3] but not maliciously;[4] that an act was done wilfully is sufficiently averred by an allegation that it was done with premeditation,[5] but not by an allegation that it was done negligently,[6] unlawfully,[7] or contrary to the statute.[8] "Violently" is equivalent to "by force," [9] "extorsively" to "corruptly," [10] "without just cause and excuse" to "without good and sufficient excuse," [11] and "wilfully and maliciously" includes "unlawfully;" [12] but "unlawfully and injuriously" will not supply the place of "fraudulently." [13] "Assaulted to ravish" does well enough for "assaulted with intent to ravish." [14]

§ 137. **If the offence now prosecuted consists in doing an act with intent to commit another crime, since the commission of the other crime is no part of the offence charged, it is enough to name it without describing it.**[15] Thus, it is enough to charge that defendant assaulted another with intent to murder him;[16] or that

[1] Barnard *v.* S., 88 Wis. 656, 60 N. W. 1058.
[2] S. *v.* Jones, 41 La. Ann. 784, 6 So. 638.
[3] S. *v.* McDaniel, 45 La. Ann. 686, 12 So. 752.
[4] S. *v.* Watson, 41 La. Ann. 598, 7 So. 125.
[5] Aubrey *v.* S., 62 Ark. 368, 35 S. W. 792.
[6] Casey *v.* S., 53 Ark. 334, 14 S. W. 90.
[7] C. *v.* Turner, 8 Bush 1.
[8] S. *v.* Stroud, 99 Ia. 16, 68 N. W. 450.
[9] S. *v.* Mueller, 85 Wis. 203, 55 N. W. 165.
[10] Loftus *v.* S., 52 N. J. L. 223, 19 Atl. 183.
[11] Giles *v.* S., 88 Ala. 230, 7 So. 271.
[12] Hodgkins *v.* S., 36 Neb. 160, 54 N. W. 86.
[13] Duff *v.* C., 92 Va. 769, 23 S. E. 643.
[14] S. *v.* Barnes, 122 N. C. 1031, 29 S. E. 381.
[15] S. *v.* Mecum, 95 Ia. 433, 64 N. W. 286.
[16] S. *v.* Lynch, 20 Or. 389, 26 Pac. 219; Kilkelly *v.* S., 43 Wis. 604. *Contra*, that the charge must be assault with intent of his malice aforethought to kill the other, S. *v.* Leavitt, 87 Me. 72, 32 Atl. 787.

he broke and entered a certain dwelling-house with intent to commit larceny in it.[1] So it is enough to charge an assault with intent to commit rape.[2] An indictment for receiving property, knowing it to have been obtained by false pretences, need not allege the pretences;[3] and an indictment for conspiracy to obtain property "by divers false pretences" is sufficient.[4] In an indictment for the offence of having counterfeit bills with intent to pass them, it is not necessary to allege when and where they are to be passed;[5] and for having burglars' tools with intent to use them, it is not necessary to state any building intended to be entered.[6]

[1] P. *v.* Shaber, 32 Cal. 36; S. *v.* Watson, 102 Ia. 651, 72 N. W. 283. It would, of course, be insufficient to aver merely an intent to commit a crime in it, without naming the crime. P. *v.* Nelson, 58 Cal. 104; S. *v.* Buchanan, 75 Miss. 349, 22 So. 875.

[2] S. *v.* Hanlon, 62 Vt. 334, 19 Atl. 773.

[3] Taylor *v.* R., [1895] 1 Q. B. 25.

[4] R. *v.* Gill, 2 B. & Ald. 204.

[5] C. *v.* Tivnon, 8 Gray 375.

[6] P. *v.* Edwards, 93 Mich. 636, 53 N. W. 778.

CHAPTER XIV.

AVERMENT OF THE ACT.

§ 138. An indictment, as has been seen, is not good unless it charges the doing of every act which goes to make up the offence.[1] Thus, an indictment for homicide must allege a killing; for larceny, must allege a taking and a felonious intent; for robbery, must allege an assault and a taking. This requirement necessarily exists, whether the offence is felony or misdemeanor, and whether it is created by common law or by a statute. Whether the indictment must go further, and not only allege the doing of the criminal act but also describe the method of doing it, and other particulars of it, cannot be determined upon any general rule, but must be investigated independently, in the case of each offence.

In the case of some felonies, the indictment is very simple, charging only the forbidden acts, without particulars. Thus the indictment for arson, in addition to the formal averments, alleges simply that defendant "feloniously and maliciously burned the house of" A.[2] The indictment for larceny alleges that defendant "feloniously stole, took, and carried

[1] *Ante*, § 100.

[2] P. *v.* Fairchild, 48 Mich. 31; P. *v.* Woodford, 62 N. Y. 117. See S. *v.* Price, 6 Halst. 203; White *v.* C., 29 Grat. 824.

away one watch, the property of A."[1] So in the common-law misdemeanor of assault and battery the indictment alleges merely that the defendant "upon one A made an assault, and him the said A then and there struck, beat, wounded, and evilly entreated;"[2] and in the common-law indictment for malicious mischief the simple charge is that the defendant "did wantonly and maliciously kill one steer, the property of A."[3]

In these indictments only the essential facts are stated. There is no description of the means of committing the injury, and no description of the result. In other common-law indictments, as will at once be seen, great particularity is required in one or both of these matters.

§ 139. **The means of accomplishing the crime must be alleged in the case of some offences which are created by the common law.** This requirement is especially severe in the indictments for murder[4] and for perjury,[5] which will be considered later. In other offences, as has just been seen, the means of doing the act need not be stated. No rule can be given for determining whether the indictment for a common-law offence shall or shall not aver the means; indeed, the authorities sometimes differ with regard to the same indictment. Thus it is sometimes held that in an indictment for disturbing a meeting the manner of disturbance should be alleged; as by talking, laughing,

[1] Train & Heard, Prec. Ind. 341; C. *v.* Adams, 7 Gray 43; Stanley *v.* S., 24 Oh. S. 166.

[2] C. *v.* Randall, 4 Gray 36; C. *v.* Thompson, 116 Mass. 346; P. *v.* Pettit, 3 Johns. 511.

[3] S. *v.* Scott, 2 Dev. & B. 35.

[4] *Post*, § 184.

[5] *Post*, § 183.

or swearing;[1] but other authorities hold it unnecessary in an indictment for disturbing the peace or for disturbing a meeting to state the nature of the disturbance.[2] In an indictment for riot it has been held that acts of riot should be particularly stated,[3] while in an indictment for assault this is not necessary.[4] An indictment for an attempt must state the acts done in the attempt; it is not enough to aver what the defendant attempted to do.[5] This is true even though by statute one may be convicted, on being indicted for an offence, of an attempt to commit it; so that if advantage is taken of the statute no acts of attempt will be stated. If the statutory method is not taken, but defendant is indicted directly for attempt, acts of attempt must be stated.[6] And yet it has been held a sufficient charge of attempt to commit arson to allege that defendant "attempted to set fire to" a barn.[7] And in a similar indictment, where acts of attempt were alleged, it was held not necessary to state particularly the nature of the combustible materials.[8]

In indictments for conspiracy to do an act in itself criminal, the means intended need not be stated, since any mere conspiring for such a purpose is a crime; but where the end is not a crime, and the con-

[1] S. *v.* Butcher, 79 Ia. 110, 44 N. W. 239; and see Kidder *v.* S., 58 Ind. 68; S. *v.* Stubblefield, 32 Mo. 563.

[2] S. *v.* Craddock, 44 Kan. 489, 24 Pac. 949; Jones *v.* S., 28 Neb. 495, 44 N. W. 658.

[3] Whiteside *v.* P., Breese 4. [4] *Ante*, § 138.

[5] U. S. *v.* Barnaby, 51 Fed. 20; Kinningham *v.* S., 119 Ind. 332, 21 N. E. 911.

[6] S. *v.* Frazier, 53 Kan. 87, 36 Pac. 58.

[7] P. *v.* Bush, 4 Hill 133. [8] C. *v.* Flynn, 3 Cush. 529.

spiracy is criminal only if certain means are to be used, these intended means must of course be stated.[1]

In an indictment for homicide, the weapon or means of accomplishing the crime must be set out.[2] This is not generally necessary in other indictments. Thus in an indictment for assault with intent to kill it is not necessary to state the weapon;[3] nor in an indictment for assault with a deadly weapon, it being enough to aver that the weapon was deadly.[4]

Some offences consist in the accused having acquired by continuance in a wrong line of conduct a certain character, for which he is punished, and not for the conduct that led to it. Such cases are those of common scold, common barrator, common night-walker, etc. In an indictment for an offence of this class it is enough to charge that the defendant is the forbidden thing without setting out any acts.[5] These offences must be carefully distinguished from those where the acquired character is not of itself an offence; the crime being the continued doing of certain wrongful acts. Such are offences sometimes but wrongly described as common oppressor and disturber of the peace,[6] common cheat.[7] The crime here, if any, is committed merely by doing acts of maintenance, or of cheating, and therefore those acts must be charged. Whether an offence falls into one or the

[1] P. *v.* Arnold, 46 Mich. 268, 9 N. W. 406; U. S. *v.* Patterson, 54 F. 1005; S. *v.* Keach, 40 Vt. 113.

[2] *Post*, § 187.

[3] Murphey *v.* S., 43 Neb. 34, 61 N. W. 491; Jackson *v.* C., 96 Va. 107, 30 S. E. 452.

[4] P. *v.* Congleton, 44 Cal. 92.

[5] C. *v.* Davis, 11 Pick. 432; S. *v.* Russell, 14 R. I. 506.

[6] R. *v.* Ledginham, 1 Mod. 288.

[7] S. *v.* Johnson, 1 D. Chip. 129.

other of these classes is a question of the substantive law of crime.

§ 140. In an indictment for an offence created by statute it is generally enough to allege the doing of the acts expressly forbidden by the statute,[1] without a particular description of the acts. Thus an allegation in the words of a statute that defendant unlawfully practised medicine,[2] or kept a restaurant,[3] or a dog,[4] without a license, or acted as a private detective without a license,[5] or engaged in a fight,[6] is enough without alleging particulars. An indictment for the statutory offence of seduction need not state the means employed;[7] an indictment for abducting a woman need not state the particulars;[8] an indictment for the illegal importation of women need not describe the method of importing;[9] and where a statute forbids detaining a woman against her will with a certain intent it is enough to state detention, in the words of the statute, without fully describing it.[10] So an indictment in the language of the statute for fitting out a vessel to engage in the slave trade is sufficient, without describing acts of fitting out;[11] and an indictment for carrying on a retail liquor

[1] *Post*, § 197.

[2] S. *v.* Little, 76 Mo. 52.

[3] Huttenstein *v.* S., 37 Ala. 157.

[4] C. *v.* Thompson, 2 All. 507.

[5] S. *v.* Bennett, 102 Mo. 356, 14 S. W. 865.

[6] C. *v.* Welsh, 7 Gray 324; C. *v.* Barrett, 108 Mass. 302; P. *v.* Taylor, 96 Mich. 576, 56 N. W. 27. *Contra*, Sullivan *v.* S., 67 Miss. 346, 7 So. 275.

[7] S. *v.* Conkright, 58 Ia. 338, 12 N. W. 283.

[8] S. *v.* Keith, 47 Minn. 559, 50 N. W. 691.

[9] U. S. *v.* Pagliano, 53 Fed. 1001.

[10] Cargill *v.* C. (Ky.), 13 S. W. 916.

[11] U. S. *v.* Gooding, 12 Wheat. 460.

business without a license is good, without stating acts of doing business.[1] An indictment for handing an inspector of election two ballots,[2] or for illegally secreting a public record,[3] need not state the means. On this principle, an indictment for an aggravated assault, like assault with intent to kill, need not describe the manner of assaulting.[4]

An indictment for illegal gaming may simply allege the playing of the game, by name, without describing the method of playing it,[5] or even its name;[6] though if the gaming is criminal only under certain circumstances (as where publicly carried on) the circumstances must be alleged.[7]

Where an element in the offence charged is the intention to commit another offence, it is enough in the indictment to state the name of the latter crime, without describing it.[8]

In some cases, however, the statutory language is so general that it can hardly be said to state and forbid any particular act; the indictment, in order to allege any act at all, must be more particular than the act. Thus an indictment alleging in the words of the statute that defendants "conspired to hinder persons in the exercise of their privileges under the

[1] Ledbetter *v.* U. S., 170 U. S. 606. But see S. *v.* Bennett (Mo.), 11 S. W. 264.

[2] S. *v.* Patterson, 116 Ind. 45, 18 N. E. 270.

[3] S. *v.* Bloor (Mont.), 52 Pac. 611.

[4] Dunn *v.* P., 158 Ill. 586, 42 N. E. 47; S. *v.* Clayton, 100 Mo. 516, 13 S. W. 819; Cunningham *v.* C., 88 Va. 37, 13 S. E. 309.

[5] S. *v.* Wilson, 9 Wash. 16, 36 Pac. 967.

[6] C. *v.* Baker, 155 Mass. 287, 29 N. E. 512.

[7] Rawls *v.* S., 70 Miss. 739, 12 So. 584.

[8] *Ante*, § 137.

Constitution," is insufficient without a statement of the particular privileges to be hindered.[1] An indictment for interfering with an officer in the performance of a duty required by law must set out the duty;[2] and an indictment, following the words of a statute, for speaking words involving the commission of a felony is insufficient without setting out the charge made.[3]

In a few cases, where the statute does forbid a specific act, an indictment in the statutory language is held insufficient without stating the means. The most striking example is the indictment for obtaining goods by false pretences, which must be much more particular than the statute.[4] This was said by Mr. Justice Story[5] to be an exceptional case, due to analogy with common-law offences, and not to be authority in indicting for a quite new statutory offence. Particularity has, nevertheless, been required in indicting for other statutory crimes. Thus an indictment alleging in the words of the statute that defendant "did wilfully injure" a certain church is not sufficient, without setting out the particulars of the injury;[6] and an indictment for distributing obscene papers is not good without stating the manner of distributing.[7] Where a statute punishes bribery by name, it is not enough in an indictment to allege that defendant bribed a certain officer — it is necessary

[1] U. S. *v.* Cruikshank, 92 U. S. 542.
[2] U. S. *v.* Wardell, 49 Fed. 914.
[3] Miles *v.* S., 94 Ala. 106, 11 So. 403.
[4] *Post*, § 196.
[5] U. S. *v.* Gooding, 12 Wheat. 460, 474.
[6] S. *v.* Costello, 62 Conn. 128, 25 Atl. 477.
[7] S. *v.* Smith, 17 R. I. 371, 22 Atl. 282.

to show particularly what he gave, and for what purpose;[1] and the same is held of an indictment against an official for asking a gratuity.[2] The few examples of this needlessly required particularity must be regarded as anomalous.

§ 141. **Several means of committing a crime may be stated conjunctively in the same count, where the crime might have been committed by the use of all the means.** Thus in an indictment of murder a number of means of killing may be averred, for the death may have resulted from the use of several weapons or from the infliction of various wounds.[3] So in an indictment for arson the burning of several houses may be alleged in a single count, since it is all one act of arson.[4] In these cases it is enough to prove any one of the means stated.

§ 142. **In some States it has been provided that an indictment for any crime shall be sufficient without alleging the means of committing the offence.**[5] Even where the constitution requires a full description of the crime, this statute seems constitutional; for if the common-law indictments for arson, larceny, and assault, in which the means are not stated, are sufficient under the constitution, it seems clear that a similar omission in other indictments would be equally good. It has been held constitutional to frame an indictment for embezzlement without stating the particulars

[1] P. *v.* Ward, 110 Cal. 369, 42 Pac. 894; S. *v.* Howard, 66 Minn. 309, 68 N. W. 1096; Brown *v.* S., 13 Tex. App. 358.

[2] U. S. *v.* Kessel, 62 Fed. 57.

[3] Anderson *v.* U. S., 171 U. S. 604; C. *v.* Macloon, 101 Mass. 1; S. *v.* Fiester, 32 Or. 254, 50 Pac. 561.

[4] Woodford *v.* P., 62 N. Y. 117.

[5] Mass. Stat. 1899, c. 409, § 14.

of the taking;[1] and in an indictment for homicide it is not constitutionally necessary to set out the means or manner of killing.[2]

FRAUD.

§ 143. In indictments for fraud the authorities greatly differ as to whether the particulars of fraud must be described. In some States it is held that they must be set out in detail.[3] Thus in an indictment for hiring a horse by false statements, the statements must be set out;[4] and in an indictment for receiving a false ballot and for making a false count of votes, the indictment must show how the count was wrong, and must particularly identify the ballot.[5] But in other States it is held enough in the case of most such offences to allege fraud by name, without describing it.[6] So in an indictment for obtaining money by means of a "counterfeit game," the game need not be described;[7] and in an indictment for altering and falsifying a public record, it is not necessary to set out the alterations.[8] On an indictment for procuring a note to be falsely made, it is not necessary to aver

[1] C. *v.* Bennett, 118 Mass. 443; S. *v.* Krug, 12 Wash. 288, 41 Pac. 126.

[2] Jordan *v.* P., 19 Col. 417, 36 Pac. 218; S. *v.* Meyers, 99 Mo. 107, 12 S. W. 516; Goersen *v.* C., 99 Pa. 388. In S. *v.* Burke, 54 N. H. 92, it was held constitutionally sufficient to state that the means were unknown.

[3] P. *v.* Neil, 91 Cal. 465, 27 Pac. 760.

[4] S. *v.* Jackson, 39 Conn. 229.

[5] S. *v.* Krueger, 134 Mo. 262, 35 S. W. 604.

[6] S. *v.* Beach, 147 Ind. 74, 46 N. E. 145; Jackson *v.* C. (Ky.), 34 S. W. 14.

[7] Morton *v.* P., 47 Ill. 468.

[8] Loehr *v.* P., 132 Ill. 504, 24 N. E. 68.

the particulars of the falsity;[1] and so of an indictment for filing a nomination paper falsely made.[2] An indictment for obtaining property by false pretences, however, everywhere requires an exact statement of the pretences.[3]

ACCESSORY.

§ 144. **An indictment of an accessory to felony, either before or after the fact, should charge the crime and aver the acts by which the accused became accessory.**[4] The ordinary practice is to join principal and accessory in the same indictment.[5] The acts of the accessory must be set out in full, and in case of accessory after the fact they must be alleged to have been done with knowledge of the crime.[6]

The so-called principal in the second degree, that is, a person who was present at the fact, "aiding and abetting," but taking no direct part in the act, is by nature, as he was once called, an accessory; and he may be indicted either like a principal or like an accessory. He may be charged simply with doing the criminal act;[7] or the offence may be fully described, and he may be charged with being present, aiding and abetting.[8]

[1] S. v. Tisdale, 39 La. Ann. 476, 2 So. 406.

[2] C. v. Connelly, 163 Mass. 539, 40 N. E. 862.

[3] *Post*, § 196.

[4] C. v. Lansdale, 98 Ky. 664, 34 S. W. 17; Street v. S. (Tex. Cr.), 45 S. W. 577.

[5] C. v. Adams, 7 Gray 43, 44.

[6] S. v. Lawrence, 43 Kan. 125, 23 Pac. 157; Street v. S. (Tex. Cr.), 45 S. W. 577.

[7] Hughes v. C. (Ky.), 12 S. W. 269; C. v. Knapp, 9 Pick. 496.

[8] Jackson v. C. (Ky.), 38 S. W. 422; S. v. Littrell, 45 La. Ann. 655, 12 So. 750.

In misdemeanors, all parties, whether they do the act or are accessory to it, are dealt with as principals; and they also may be indicted like principals or like accessories. They may be charged with doing the act,[1] or, the offence being fully described, they may be charged as accessory to it.[2] Thus one who is criminally responsible for a misdemeanor committed by his agent may always be charged with doing the act himself.[3]

It seems that a principal felon may be convicted on an indictment for being present, aiding and abetting,[4] and a principal in misdemeanor may be convicted on an indictment charging him as an accessory,[5] the offence described being in each case the offence of principal. It therefore appears that indictments for felony as principal and as principal in the second degree, or for misdemeanor as principal and as accessory, are in all respects interchangeable.

It is provided by statute in some States that an accessory before the fact in felony may be punished without regard to the principal, and even that he may be indicted as principal. Where the latter provision is adopted, it is sufficient to charge him with having done the act;[6] and in Illinois it is error to charge the commission of the crime and allege that the accused committed accessorial acts.[7] Under most statutes of this sort, however, it is safest and sufficient to

[1] C. *v.* Gray, 150 Mass. 327, 23 N. E. 47.
[2] U. S. *v.* Mills, 7 Pet. 138.
[3] C. *v.* Park, 1 Gray 553; C. *v.* Gillespie, 7 S. & R. 469.
[4] S. *v.* Littrell, 45 La. Ann. 655, 12 So. 750.
[5] Wagner *v.* S., 43 Neb. 1, 61 N. W. 85.
[6] Coates *v.* P., 72 Ill. 303.
[7] Fixmer *v.* P., 153 Ill. 123, 38 N. E. 667.

frame the regular indictment for accessorial acts;[1] and in California, at least, an indictment which does not state the accessorial acts is insufficient.[2]

[1] P. *v.* Rozelle, 78 Cal. 84, 20 Pac. 36; S. *v.* Stacy, 103 Mo. 11, 15 S. W. 147; P. *v.* Peckens, 153 N. Y. 576, 47 N. E. 883.

[2] P. *v.* Campbell, 40 Cal. 129.

CHAPTER XV.

CIRCUMSTANCES OF THE ACT.

TIME.

§ 145. At common law every indictment must allege the time when the offence was committed, by year, month, and day.[1] To omit the day, month, or year is fatal.[2] At common law the year (unless the regnal year of the sovereign) must be alleged to be the year of our Lord; now, however, it is usually held enough to give the date as of a certain year, without stating the era.[3] The time alleged, however, need not be proved, unless it is an essential element of the offence. It is enough at the trial to prove any day within the statute of limitations and before the finding of the indictment,[4] or, more accurately, before the actual presentment of the indictment in court.[5] Therefore a variance between the date of a complaint and the

[1] S. *v.* Beaton, 79 Me. 314; S. *v.* Johnson, 32 Tex. 96.

[2] Braddy *v.* S. (Ga.), 27 S. E. 670.

[3] C. *v.* Traylor (Ky.), 45 S. W. 450; C. *v.* Smith, 153 Mass. 97, 26 N. E. 436.

[4] Vane's Case, Kel. 14; Ledbetter *v.* U. S., 170 U. S. 606; S. *v.* Munson, 40 Conn. 475; Shipp *v.* C. (Ky.), 41 S. W. 856; C. *v.* Brown, 167 Mass. 144, 45 N. E. 1. In New York, however, under the Code, it seems that a variance ought to be rectified by amendment of the indictment, and the indictment as amended should be exactly proved. P. *v.* Formosa, 131 N. Y. 478, 30 N. E. 492.

[5] S. *v.* Brownrigg, 87 Me. 500, 33 Atl. 11; Hardy *v.* S. (Tex. Cr.), 44 S. W. 173.

information issued upon it is not material, if in other respects the charges appear to be identical.[1]

Time may be sufficiently stated by reference, as by reference to the caption,[2] or to the time stated in a former count.[3]

In a few jurisdictions it is suggested that the omission of the day of the month is not material,[4] and that an allegation that the offence was committed "on or about" a day named is good at common law;[5] but this is not usually so held.[6]

§ 146. **A common statute provides that time need not be stated unless it is of the essence of the offence, and if imperfectly stated the indictment shall nevertheless be sufficient.** Under this statute the omission of the day is not fatal.[7] And under such a statute an allegation that the offence was committed "on or about" a certain date is of course enough.[8] Another common statute provides that a conviction of embezzlement may be had for any act within six months after the time stated in the indictment. Under this statute, the defendant cannot be convicted for an act before or more than six months after the time alleged.[9]

[1] Shelton *v.* S., 27 Tex. App. 443, 11 S. W. 457.

[2] Jacobs *v.* C., 5 S. & R. 315.

[3] Wills *v.* S., 8 Mo. 52.

[4] Ledbetter *v.* U. S., 170 U. S. 606.

[5] U. S. *v.* Conrad, 59 Fed. 458; S. *v.* McCarthy, 44 La. Ann. 323, 10 So. 673.

[6] S. *v.* Beaton, 79 Me. 314; T. *v.* Armijo, 7 N. M. 571, 37 Pac. 1117.

[7] Fleming *v.* S., 136 Ind. 149, 36 N. E. 154; P. *v.* Hawkins, 106 Mich. 479, 64 N. W. 736; Arrington *v.* C., 87 Va. 96, 12 S. E. 224.

[8] Rema *v.* S., 52 Neb. 375, 72 N. W. 474; Keith *v.* S. (Tex. Cr.), 44 S. W. 847.

[9] P. *v.* Donald, 48 Mich. 491, 12 N. W. 669; S. *v.* Holmes, 65

§ 147. **A continuous offence, which may extend over a number of days, may be stated as continuing; as by alleging that it occurred on a certain day and on divers days between that day and the finding of the indictment; or that it occurred between certain days.**[1] In some States the prosecution is confined to the limits stated, and cannot prove the commission of the crime outside those limits, though it may prove it on any day within the limits;[2] and if an offence is stated as a continuing one, but is alleged to have occurred on only one day, no other date can be proved.[3]

In other States, in a continuing offence as in any other, it is permissible to prove that the offence was committed at any time before the indictment and within the statute of limitations.[4] A *continuando* running later than the date of the accusation is of course defective.[5]

For an offence which consists of a single act one time only can be stated; to charge it on two days, with or without a *continuando*, is therefore bad.[6]

§ 148. **In some offences the time is a material element of the offence, and must therefore be alleged and proved as alleged.** Thus an offence against the Sunday law must be alleged to have been committed on Sunday;

Minn. 230, 68 N. W. 11; S. *v.* Cornhauser, 74 Wis. 42, 41 N. W. 959.

[1] S. *v.* Auburn, 86 Me. 276, 29 Atl. 1075.

[2] S. *v.* Small, 80 Me. 452, 14 Atl. 942; C. *v.* Lord, 147 Mass. 399, 18 N. E. 67; Fleming *v.* S., 28 Tex. App. 234, 12 S. W. 605.

[3] C. *v.* Traverse, 11 All. 260.

[4] S. *v.* Arnold, 98 Ia. 253, 67 N. W. 252; S. *v.* Reno, 41 Kan. 674, 21 Pac. 803.

[5] C. *v.* LeClair, 147 Mass. 539, 18 N. E. 428.

[6] C. *v.* Adams, 1 Gray 481; S. *v.* Temple, 38 Vt. 37.

it is not enough to aver a date that fell, in fact, on Sunday;[1] and the same thing has been held in the case of an offence on election day.[2] But where the offence must be committed not on a single day, but within a certain period, it is held sufficient to aver a date falling within the period. Thus where the act is an offence between September and April, an allegation that it was committed on March 1 was held sufficient, without alleging that it was between September and April.[3] And when an act was not criminal between the first and fifteenth days of January, it was sufficient to charge the act as unlawfully done, without alleging that it was done after the fifteenth day of January.[4]

On this general principle, an indictment for burglary must allege that the crime was committed in the night-time.[5] It has often been said that time is necessary in an indictment for perjury, and must be proved as laid.[6] But this doctrine, by the better view, is limited to cases where the statement of time is the date, and therefore part of the description, of a document, like a record, deposition, or affidavit, in taking oath to the truth of which the alleged perjury

[1] S. *v.* Dodge, 81 Me. 391, 17 Atl. 313; Gelbert *v.* C. (Pa.), 32 Atl. 1091. But see Werner *v.* S., 51 Ga. 426, where it was held that if the offence was alleged to have been committed on Sunday, but the date named fell on Friday, the indictment was bad.

[2] Keith *v.* S. (Tex. Cr.), 44 S. W. 847.

[3] R. *v.* Brown, Moo. & Mal. 163. See *acc.* Hewitt *v.* S., 121 Ind. 245, 23 N. E. 83.

[4] Dentler *v.* S., 112 Ala. 70, 20 So. 592 (statutory).

[5] C. *v.* Williams, 2 Cush. 582; Shelton *v.* C., 89 Va. 450, 16 S. E. 355.

[6] S. *v.* Ah Lee, 18 Or. 540, 23 Pac. 424 (*semble*); Rhodes *v.* C., 78 Va. 692.

was committed.[1] When the time is not necessary as part of the description of a document, it need not be proved as laid.[2]

§ 149. **If a date stated in the indictment is impossible it makes the indictment bad.** Thus, where in an indictment for a second offence the first offence was alleged to have been committed in the year 1088, the indictment was bad.[3]

Although the time of the offence as stated in the indictment need not generally be proved, and it is therefore as well to state a wrong time as the correct time, yet in form the statement is an important one. If the time stated is such as to be inconsistent with a punishable offence having been committed, so that as it stands the indictment charges no crime, it must be quashed. If the alleged date of the offence is impossible, it is as fatal to the indictment as any other impossible averment. Therefore, if the date alleged is subsequent to the finding of the indictment, the indictment is demurrable.[4] The defect is a material one, and cannot be amended;[5] and it is fatal even where a statute forbids an acquittal for formal defects.[6] Where the alleged date of the offence was the same day on which the indictment was returned into

[1] U. S. *v.* Law, 50 Fed. 915.

[2] Matthews *v.* U. S., 161 U. S. 500; Shell *v.* S., 148 Ind. 50, 47 N. E. 144.

[3] S. *v.* Dorr, 82 Me. 341, 19 Atl. 861.

[4] S. *v.* Sexton, 3 Hawks 184; Watson *v.* S. (Tex. Cr.), 45 S. W. 718.

[5] S. *v.* Smith, 88 Ia. 178, 55 N. W. 198. *Contra* (by statute), S. *v.* Crawford, 99 Mo. 74, 12 S. W. 354.

[6] Murphy *v.* S., 106 Ind. 96, 5 N. E. 767; C. *v.* Doyle, 110 Mass. 103.

court, since the commission of the offence is stated in the past tense, and it is possible that it was committed earlier on the same day, the indictment would seem sufficient.[1]

In a few cases, though the date was a future one, the indictment has been upheld as only formally defective. Thus, where an offence was alleged to have occurred in 1886 (a future date), at the last election, and the last election was in 1884, before indictment found, the indictment was held good in substance.[2] And in some cases it is held that after verdict judgment would not be arrested for the defect, though the indictment might have been demurrable.[3]

§ 150. **By the weight of authority, the alleged date of the offence must fall within the period limited in the statute of limitations, or the indictment will be demurrable;**[4] unless facts are stated which remove the case from the limitation. If by statute the statement of the time of an offence is not material, and the statement of time is omitted, it is necessary in jurisdictions following this rule to allege that the offence was committed within the statutory period.[5] In other jurisdictions, however, the indictment is good even if the date named falls beyond the period limited by

[1] S. *v.* Pratt, 14 N. H. 456. *Contra*, Andrews *v.* S. (Tex. App.), 14 S. W. 1014.

[2] S. *v.* Patterson, 116 Ind. 45, 10 N. E. 289; and see S. *v.* Brooks, 85 Ia. 366, 52 N. W. 240.

[3] Poole *v.* P., 24 Col. 510, 52 Pac. 1025; Benson *v.* C., 158 Mass. 164, 33 N. E. 384.

[4] C. *v.* Taylor (Ky.), 43 S. W. 400; P. *v.* Gregory, 30 Mich. 371; S. *v.* Caverly, 51 N. H. 446; note, 2 Green Cr. R. 96.

[5] Stamper *v.* C. (Ky.), 37 S. W. 915.

the statute; and it is permitted upon such an indictment to prove an offence falling within the statutory period, or an offence excepted out of the statute.[1] And this would seem the better view, since the setting up of the statute is a matter of defence, and should be held to lie upon the defendant.

§ 151. **When the criminal law has recently been changed by statute, an indictment for an offence affected by the statute must accurately state the time or else must allege under which law the offence fell.** This is of course essential, as the alleged acts would, if done at one time, constitute one offence, but a different offence if done at another time. So, though by statute time need not generally be stated, it must be stated in this case.[2] The allegation of a date falling, in fact, before or after the change is enough to bring the indictment under the old or the new law, without further allegation.[3] Where the change of law took place so long ago that offences under the old law would be barred by the statute of limitations, it was held not necessary to state the time, a statute rendering the allegation of time not generally necessary.[4]

PLACE.

§ 152. **The place of the offence must be alleged in the indictment,** properly by a statement of the county and town where the offence was committed.[5] The object

[1] U. S. *v.* Cook, 17 Wall. 168; P. *v.* Santvoord, 9 Cow. 655.

[2] Cool *v.* C., 94 Va. 799, 26 S. E. 411.

[3] S. *v.* Dorr, 82 Me. 212, 19 Atl. 171; C. *v.* Maloney, 112 Mass. 283.

[4] Dentler *v.* S., 112 Ala. 70, 20 So. 592.

[5] Knight *v.* S., 54 Oh. S. 365, 43 N. E. 995; S. *v.* Johnson, 32 Tex. 96.

of this allegation is to show the jurisdiction of the court. It is not enough, however, omitting the allegation of place, to aver that the offence was committed "within the jurisdiction of the court," since that, it is said, is a conclusion of law, and the indictment must set forth the facts on which the conclusion is based.[1]

Unless place is a material element in the description of the offence, it is not necessary to prove the commission of the offence at the place named in the indictment; it is enough to prove the act at any place within the jurisdiction of the court.[2] The allegation of place, like that of time, must be correct in form; the proof of place must be sufficient in substance; but place alleged and place proved need not be identical.

If the county where the offence was committed is stated, but not the town, it is sufficient,[3] unless the jurisdiction of the court covers only part of the county, in which case some place within the jurisdiction of the court must be named.[4] Where a crime is committed on the high seas, the court having jurisdiction over crimes committed anywhere on the high seas, it is enough to allege, generally, that the crime was committed on the high seas, without stating the locality more particularly.[5]

On the other hand, if the county is not named, but

[1] Early *v.* C., 93 Va. 765, 24 S. E. 936.

[2] Ledbetter *v.* U. S., 170 U. S. 606; Carlisle *v.* S., 32 Ind. 55; C. *v.* Tolliver, 8 Gray 386; P. *v.* Honeyman, 3 Den. 121.

[3] Keith *v.* S., 90 Ind. 89; S. *v.* Oswald, 59 Kan. 508, 53 Pac. 525.

[4] P. *v.* Wong Wang, 92 Cal. 277, 28 Pac. 270.

[5] St. Clair *v.* U. S., 154 U. S. 134; Anderson *v.* U. S., 171 U. S. 604.

a place is named which the court knows to be in the county, it is sufficient; as where the offence is alleged to have occurred in a town which is made by statute part of a certain county.[1] It has even been held that where the town was stated in the wrong county, the court would take notice of that fact, and would consider the venue well laid in the county in which the town in fact lay.[2] Where a certain river was part of a county, it was enough to allege the crime to have been committed in the river.[3] Where the averment of place is of this sort, proof must, of course, be confined to some place within the town or river named, and cannot extend to another part of the same county.

In descriptions of place, "to" or "from" does not mean "within." So where a transportation indicted as criminal was "from A to B," B being a border town in the county and A outside the county, there was no allegation that the act took place in the county.[4]

In some States it has been provided by statute that where place is not a material element of the offence, it need not be averred in the body of the indictment, but the county stated in the caption shall be taken as the place of the alleged acts.[5]

§ 153. **Where the county has been stated in the caption or commencement, the act may be alleged to have been done within the county by using the words "in said**

[1] Green *v.* C., 111 Mass. 417.

[2] P. *v.* Breese, 7 Cow. 429.

[3] Acton *v.* S., 80 Md. 547, 31 Atl. 419.

[4] S. *v.* Bushey, 84 Me. 459, 24 Atl. 940.

[5] Mass. Stat. 1899, c. 409, § 10; P. *v.* Schultz, 85 Mich. 114, 48 N. W. 293.

county."[1] So where time and place are named in the caption, "then and there" in the body of the indictment are sufficient allegation of time and place.[2]

So where the indictment has several counts, and time and place are sufficiently stated in the first count, it is enough in subsequent counts to allege that the act was done "then and there,"[3] or was done "in the county aforesaid" or "on the day aforesaid."[4] If there is no such reference, the fact that time and place are stated in the first count will not supply an omission in the second count.[5]

§ 154. **In an offence that has to do with a particular place (commonly called a local offence) the place must be alleged and proved exactly, as part of the description of the offence.** Thus, in an indictment for enticing a female to a house of prostitution, the particular house must be described; it is not enough to state the city in which it was situated.[6] In a prosecution for selling liquor without a license, it has been held that the precise place of sale must be alleged, since a license, if the defendant was relying on one for his protection, would extend only to a certain building.[7] In a prosecution for nuisance which includes a prayer for abatement, the exact

[1] P. *v.* Baker, 100 Cal. 188, 34 Pac. 649; Hawkins *v.* S., 136 Ind. 630, 36 N. E. 419; S. *v.* Assmann, 46 S. C. 554, 24 S. E. 673.

[2] Rivers *v.* S., 144 Ind. 16, 42 N. E. 1021.

[3] Fisk *v.* S., 9 Neb. 62, 2 N. W. 381.

[4] S. *v.* Hertzog, 41 La. Ann. 775, 6 So. 622; Bartley *v.* S., 53 Neb. 310, 73 N. W. 744.

[5] Jones *v.* C., 86 Va. 950, 12 S. E. 950.

[6] Nichols *v.* S., 127 Ind. 406, 26 N. E. 839. It was held, however, under a statute, that the error was not available in arrest of judgment.

[7] Arrington *v.* C., 87 Va. 96, 12 S. E. 224. *Contra*, S. *v.* Boggess, 36 W. Va. 713, 15 S. E. 423.

location of the nuisance must be stated.[1] So where an offence is directed against real estate, as against a dam, a parcel of land, or a building (in forcible entry, burglary, arson, etc.), the building is usually described by stating its location. The place is then laid, not merely as the venue of the offence, but as part of the description of the injured property. It is usual to describe the building by stating the parish or town in which it is located.[2] But it is sufficient description of the place of a building to allege that the offence was committed at a certain place in a certain building, since the building must be located where the offence in the building was committed.[3]

In other cases the location is material to the commission of the offence; as in failure to repair a highway,[4] and in nuisance on land, as maintaining a house of ill-fame, or a liquor nuisance.[5] So of the offence of illegally bringing or transporting liquor within a town.[6] In these cases, also, the statement of the town in which the land or premises were situated is usually enough.[7] In cases of this sort the allegation of place, being a necessary part of the description of the real estate injured, must be proved exactly as laid.[8]

[1] Droneberger *v.* S., 112 Ind. 105, 13 N. E. 259 (*semble*).

[2] S. *v.* Murphy, 7 Ind. App. 44, 34 N. E. 248; C. *v.* Tolman, 149 Mass. 229, 21 N. E. 377; S. *v.* Burdett, 145 Mo. 674, 47 S. W. 796. See S. *v.* Kelley, 66 N. H. 577, 29 Atl. 843.

[3] R. *v.* Napper, 1 Moo. C. C. 44; C. *v.* Lamb, 1 Gray 493; S. *v.* Meyers, 9 Wash. 8, 36 Pac. 1051.

[4] C. *v.* North Brookfield, 8 Pick. 463.

[5] C. *v.* Heffron, 102 Mass. 148.

[6] S. *v.* Libby, 84 Me. 461, 24 Atl. 940.

[7] S. *v.* Smith, 5 Harr. 490; Droneberger *v.* S., 112 Ind. 105, 13 N. E. 259; P. *v.* Ringsted, 90 Mich. 371, 51 N. W. 519.

[8] R. *v.* St. John, 9 C. & P. 40 (*semble*); C. *v.* Heffron, 102 Mass.

Some acts are offences only if committed in a certain limited space; and in such cases the allegation of place must bring the offence within the given limits. Thus where the sale of liquor was forbidden "within three miles of Providence College," an offence under the act must be alleged to have occurred within three miles of the college;[1] so where the sale of liquor is prohibited in part but not all of a county,[2] as by local option laws.

§ 155. **Where a description of a place has been stated with unnecessary particularity, it must be proved as laid,**[3] according to the usual rule.[4] Thus, where certain land was described by metes and bounds, the bounds named must be exactly proved, though it might have been enough to name the town in which the land lay.[5] So where the ward of the city in which a building was situated was unnecessarily stated, it must be exactly proved.[6]

REPETITIONS OF TIME AND PLACE.

§ 156. **Time and place must be alleged for every independent material fact averred.** It is not enough to state the time of the principal fact. If one alleged fact preceded another, it must be so stated; or if all the facts were simultaneous, that must be averred.

148. *Contra*, when allegation not necessary for identification. P. *v.* Geiger, 116 Cal. 440, 48 Pac. 389.

[1] Ragan *v.* S., 67 Miss. 332, 7 So. 280.

[2] See Brown *v.* S. (Ga.), 30 S. E. 837.

[3] S. *v.* Kelly, 66 N. H. 577, 29 Atl. 843. In S. *v.* Bain, 43 Kan. 638, 23 Pac. 1070, which might seem *contra*, the court appears to have been of opinion that there was no real variance.

[4] *Ante*, § 112.

[5] C. *v.* Wellington, 7 All. 299.

[6] P. *v.* Slater, 5 Hill 401.

In many cases, indeed, it is essential to show that certain acts are simultaneous in order to prove the existence of a crime; for instance, in burglary the breaking and entry and the intent must coexist, and in robbery the larceny and the violence.[1] So in an indictment for the crime of having at one time ten counterfeit bank-notes in possession, it is essential to the commission of the crime that the possession should be alleged and proved simultaneous.[2] But the requirement of an allegation of time and place for every fact is not confined to cases where some relation of time and place between the facts of the offence is essential.

In cases where the allegation is not essential to a statement of the crime, the courts have, nevertheless, been exceedingly technical in insisting upon the requirement; in many cases the rules of common sense have been openly defied in order to insist on mere technical accuracy in a really immaterial averment. This has been especially true in cases where the court was not unwilling to quash the proceedings, as in indictments for capital felonies,[3] or in the outworn process to enforce the forfeiture of a deodand.[4] Of late years the courts have been more willing to use common sense. As Chief Justice Ewing said, "There might have been, with the words 'then and there,' a greater deference to tautology, but not thereby a more explicit or intelligible averment;"[5]

[1] R. *v.* Francis, 2 Stra. 1015.
[2] Edwards *v.* C., 19 Pick. 124.
[3] Metcalf, J., in C. *v.* Bugbee, 4 Gray 206, 208.
[4] R. *v.* Brownlow, 11 A. & E. 119.
[5] S. *v.* Price, 6 Halst. 203, 210.

and Judge Metcalf, after quoting a *dictum* that but for a statute the court would have felt itself "conclusively bound, by the old decisions, to arrest the judgment without being at liberty to scrutinize the reasons of them,"[1] added, "We do not feel thus bound."[2]

A sensible statutory provision is that "all the averments of the indictment shall be taken to refer to the same time and place unless otherwise stated."[3] Under this statute it is necessary to allege a time only in the comparatively rare cases where all the facts of the crime are not simultaneous.

§ 157. **When time and place have once been stated, and other alleged facts occurred at the same time and place, it is not customary to repeat the allegations of time and place explicitly, but to assert that the other acts were done "then and there."** These words import absolute coexistence both in time and place.[4] Though commonly used in connection, the words "then" and "there" may be so used separately as to show that the facts were identical in time and place.[5]

Other expressions may take the place of "then and there;" but courts have been unduly loath to accept them. Thus "instantly" has been held not a sufficient equivalent; to say that a man died instantly of the wound given him, it is said, is not to say that he died at the time and place of the wound. This was held in an English case, where the forfeiture of a boiler and engine as deodand was asked; and the court may have been influenced by their hostility to

[1] S. *v.* Cherry, 3 Murph. 7. [2] C. *v.* Bugbee, 4 Gray 206.
[3] Mass. Stat. 1899, c. 409, § 10.
[4] Palmer *v.* P., 138 Ill. 356, 28 N. E. 130; S. *v.* Reid, 20 Ia. 413.
[5] S. *v.* Thibodaux, 49 La. Ann. 15, 21 So. 127.

such a proceeding.[1] The same decision was reached in a prosecution for murder in Missouri;[2] but in later cases "immediately" has been held sufficient.[3] If the literal meaning of the word is taken, it is certainly sufficient to convey the meaning of "then and there;" and since the whole requirement is technical, it seems not improper to insist upon technical accuracy of interpretation to sustain the allegation.

With somewhat more plausibility, "immediately" has been held insufficient.[4] And the present participle is not allowed to convey the idea of identity in time with its principal verb. Thus, where it was alleged that defendant with force entered certain lands, being the freehold of another, the indictment was bad; because "being the freehold" naturally referred to the time of finding the indictment, not of the entry.[5] In a similar case, an indictment which alleged that a building was "then used as a place where women are employed" was not sufficient to allege that the women were employed at the time of the use averred.[6]

Where more than one time and place have been alleged in the indictment, "then and there" or "county aforesaid" will ordinarily be ambiguous and the indictment bad.[7] But it may be possible so

[1] R. *v.* Brownlow, 11 A. & E. 119.

[2] Lester *v.* S., 9 Mo. 658.

[3] Borrego *v.* T. (N. M.), 46 Pac. 349; Hardin *v.* S., 4 Tex. App. 355. In the latter case, a not very successful effort was made to distinguish the Missouri case just cited.

[4] R. *v.* Francis, 2 Strа. 1015. [5] Poynts's Case, Cro. Jac. 214.

[6] S. *v.* Brown, 7 Wash. 10, 34 Pac. 132.

[7] Connor *v.* S., 29 Fla. 455, 10 So. 891; S. *v.* McCracken, 20 Mo. 411.

to interpret the allegations as to avoid the ambiguity.[1] It is usually held that where a town is named as in the "county aforesaid" there can be no ambiguity, since the court knows in what county each town is situated.[2] It has, however, been held in Massachusetts, that this rule will not be adopted unless the place is spoken of as a town; and where the place was laid as "Westminster, in the county aforesaid," two counties having been named, though Westminster is, in fact, a town, it was held that the court would not take notice of that fact, since it was not so named.[3]

NAME OF A VICTIM OR OTHER THIRD PARTY.

§ 158. **Where the offence is committed by means of a direct injury to an individual, the name of the victim must be stated.** Thus, in an indictment for murder, the name of the person killed must be alleged.[4] If the name is unknown it may be so stated,[5] giving as full a description as may be. Thus, to describe the victim as "a female child, whose name is unknown," is enough, without stating the parent's name;[6] and, indeed, even a statement of the sex is in such a case unnecessary.[7]

[1] Jeffries *v.* C., 12 All. 145; C. *v.* Williams, 149 Pa. 54, 24 Atl. 158.

[2] P. *v.* Breese, 7 Cow. 429.

[3] C. *v.* Wheeler, 162 Mass. 429, 38 N. E. 1115. The doctrine of this case seems to be opposed to the earlier case of Green *v.* C., 111 Mass. 417, which was not noticed. The decision is questionable.

[4] 2 Hawk. P. C. c. 25, § 72; S. *v.* Griffin, 48 La. Ann. 1409, 20 So. 905.

[5] *Ante*, § 125.

[6] S. *v.* Richmond, 42 La. Ann. 299, 7 So. 459.

[7] Clarke *v.* S., 117 Ala. 1, 23 So. 671.

So in the case of fraud it is necessary to describe by name the victim, or intended victim, of the fraud. Thus, the name of the principal, employer, or bailor must be stated in an indictment for embezzlement;[1] and the name of the person defrauded or intended to be defrauded must be stated in an indictment for forgery.[2] It is enough to allege the name of any one to be defrauded; thus an alleged intent to defraud A is proved by showing an intent to defraud a partnership of which A is a member, since A himself would be affected thereby.[3] When the intention is to defraud the public, it is enough so to state, without naming any individual.[4] It is provided by statute in several States that it shall not be necessary to state the name of the person intended to be defrauded.[5]

§ 159. **Where a third person is connected with an offence more remotely, not as the direct victim of the injury, it is not usually necessary to state his name in the indictment.** So in an indictment for receiving stolen goods, the name of the thief need not be stated.[6] In an indictment for stealing, or otherwise wrongfully dealing with a promissory note, it is not necessary to

[1] Dorsey *v.* S., 111 Ala. 40, 20 So. 629; S. *v.* Roubles, 43 La. Ann. 200, 9 So. 435.

[2] Goodson *v.* S., 29 Fla. 511, 10 So. 738; Huff *v.* C. (Ky.), 42 S. W. 907; S. *v.* Murphy, 17 R. I. 698, 24 Atl. 473. *Contra* (by statute), S. *v.* Adamson, 43 Minn. 196, 45 N. W. 152.

[3] S. *v.* Hastings, 53 N. H. 452.

[4] McKee *v.* S., 111 Ind. 378, 12 N. E. 510; P. *v.* Arnold, 46 Mich. 268, 9 N. W. 406; Amer. F. Ins. Co. *v.* S., 75 Miss. 24, 22 So. 99.

[5] Mass. Stat. 1899, c. 409, § 23; N. Y. Co. Crim. Pro. § 281.

[6] R. *v.* Jervis, 6 C. & P. 156; P. *v.* Ribolsi, 89 Cal. 492, 26 Pac. 1082; Campbell *v.* S. (Miss.), 17 So. 441; Ream *v.* S., 52 Neb. 727, 73 N. W. 227.

state the name of the payee,[1] or, at least, in the case of a bank-note, of the maker;[2] for forging a check, the name of the bank on which it was drawn need not be alleged;[3] and in an indictment for bribery by giving a promissory note the name of the maker need not be averred.[4] In an indictment for obtaining goods from an agent by false pretences, where, of course, the name of the principal, as the person defrauded, should be stated, the name of the agent need not be alleged.[5] In an indictment for practising medicine without a license, the name of the patient need not be stated.[6]

In offences which consist in maintaining a disorderly house of some sort it is not necessary to state the names of the frequenters.[7] So in an indictment for keeping a gaming-house it is not necessary to state the names of players,[8] and in an indictment for being a common seller of intoxicating liquor, it is not necessary to allege the names of buyers.[9]

In indictments for illegal trading or selling, however, it is usually held that the name of the purchaser must be stated. Thus the name of the purchaser

[1] S. *v.* Rue (Minn.), 75 N. W. 235.

[2] Foster *v.* S., 71 Md. 553, 18 Atl. 972.

[3] Santolini *v.* S. (Wyo.), 42 Pac. 746.

[4] C. *v.* Donovan, 170 Mass. 228, 49 N. E. 104.

[5] C. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91.

[6] S. *v.* Little, 76 Mo. 52.

[7] R. *v.* Higginson, 2 Burr. 1232.

[8] S. *v.* Pancake, 74 Ind. 15; S. *v.* Wilson, 9 Wash. 16, 36 Pac. 967. In Ohio a scarcely sufficient distinction was made, and it was held that in an indictment for permitting gaming in one's house the names of the players must be stated. Buck *v.* S., 1 Oh. S. 61. The contrary was held, however, in P. *v.* Carroll, 80 Cal. 153, 22 Pac. 129.

[9] C. *v.* Pray, 13 Pick. 359; S. *v.* Williams (S. D.), 75 N. W. 815.

must be stated in an indictment for a sale by lottery.[1] So far is this doctrine carried that a statutory form of indictment for selling liquor without a license, omitting the name of the purchaser, has been held unconstitutional in Indiana,[2] though it was admitted that if the name were unknown it might constitutionally be so stated, and such statement would of course convey no useful information upon this point to the accused. In a case in Mississippi it has been held in such a case, more properly, that the sale complained of must be identified in some way; it is unconstitutional to provide by statute for the omission of every circumstance of the sale. It is enough, however, omitting the name of the purchaser, to describe particularly the goods sold.[3]

The doctrine of the last case is accepted as a statement of the common law in many cases. Thus, it is the more generally accepted doctrine that in an indictment for the illegal sale of liquor the name of the purchaser need not be stated, even if known;[4] though in a few jurisdictions allegation of the name of the purchaser is required.[5] It seems difficult to distinguish, in this respect, between an indictment for a sale of liquor and one for any other unlawful sale. Indeed, in Massachusetts, where, as has been seen, the name of the purchaser at a sale by lottery must be stated, it has been held unnecessary in an indict-

[1] C. *v.* Sheedy, 159 Mass. 55, 34 N. E. 84.

[2] McLaughlin *v.* S., 45 Ind. 338.

[3] Murphy *v.* S., 24 Miss. 590.

[4] Rice *v.* P., 38 Ill. 435; Junction City *v.* Webb, 44 Kan. 71, 23 Pac. 1073; S. *v.* Rogers, 39 Mo. 431; Osgood *v.* P., 39 N. Y. 449; S. *v.* Gummer, 22 Wis. 441.

[5] McLaughlin *v.* S., 45 Ind. 338.

ment for "being present in a room selling pools" to aver the name of the buyer.[1] These decisions indicate an uncertainty in the courts as to the amount of particularity necessary in such indictments, and a tendency toward dispensing with the averment of facts which may be described as unknown if they are so in fact.

The necessity of stating the name of the owner of property is discussed in the next chapter.

[1] C. *v.* Swain, 160 Mass. 354, 35 N. E. 862.

CHAPTER XVI.

DESCRIPTION AND OWNERSHIP OF PROPERTY.

§ 160. **Property is described by the name by which it is commonly called.** If a particular form or manufacture of something has in common parlance a particular name, it must be called by that name and not by the name of the material of which it is composed. Thus, an iron pot cannot be described as iron, a yard of cloth as wool, or a gold coin as gold;[1] nor can an overcoat be described as cloth.[2] Conversely, if an article of manufacture has been pulled to pieces the pieces must be named as such, not by the name of the formerly existing whole: where a brass furnace is taken to pieces it must be described as pieces of the furnace, no longer as a furnace.[3]

If the name is not well known, but is the name regularly applied by good authorities to the article in question, and there is no other common name, it is sufficient; as where *barilla* was the word used to describe a certain grade of soda.[4] And so where the common name is a word which might possibly have an ambiguous meaning, the context may make it sufficient. Thus, "one trunk" is a good description,

[1] R. *v.* Mansfield, Car. & M. 140.
[2] C. *v.* Clair, 7 All. 525.
[3] R. *v.* Halloway, 1 C. & P. 127.
[4] C. *v.* James, 1 Pick. 375.

though trunk also designates part of the body;[1] "a pair of shoes" means shoes for a human being, though it might mean shoes for an animal;[2] "neat cattle" does not mean clean cattle;[3] and "a five dollar bill" sufficiently describes a bank-bill for the payment of five dollars.[4]

On the other hand, if the name by which the article is called is the common designation of it, it is sufficient description, without adding any word to designate the form, title, or amount of it. Thus a bar of iron may be described as iron, a bale of wool as wool, or an ingot of tin as tin;[5] a bale of cotton as cotton,[6] a cord of wood as wood,[7] a book as such, without stating the title,[8] thirty yards of cloth and one coat, without stating the kind of cloth or the material of the coat.[9] On this principle, perhaps, in an indictment for the sale of intoxicating liquor it is not necessary to state the kind of liquor sold,[10] though beer or whiskey seems to be a well-established specific designation.

The word "house" includes a dwelling-house; and though an allegation that a house was burned does not sufficiently state the burning of a dwelling-house, yet if burning a house is a crime it may be proved by

[1] Churchwell *v.* S., 117 Ala. 124, 23 So. 72.

[2] Palmer *v.* S., 136 Ind. 393, 36 N. E. 130; C. *v.* Shaw, 145 Mass. 349, 14 N. E. 159.

[3] S. *v.* Hoffman, 53 Kan. 700, 37 Pac. 138.

[4] Green *v.* S., 28 Tex. App. 493, 13 S. W. 784.

[5] R. *v.* Mansfield, Car. & M. 140.

[6] Peters *v.* S., 100 Ala. 10, 14 So. 896.

[7] S. *v.* Labauve (La.), 15 So. 172.

[8] S. *v.* Logan, 1 Mo. 532.

[9] C. *v.* Campbell, 103 Mass. 436.

[10] S. *v.* Whalen, 54 Ia. 753, 6 N. W. 552; S. *v.* Rogers, 39 Mo 431; Frickie *v.* S. (Tex. Cr.), 45 S. W. 810.

showing the burning of a dwelling-house. There is no variance.[1] On the other hand, upon an indictment for burning a dwelling-house, since the word "dwelling" is descriptive, there is a variance if the proof shows the burning of a house not a dwelling-house; and as there is a variance there can be no conviction for burning a house.[2]

An indefinite description is clearly bad; as "one hundred articles of household furniture,"[3] "one hundred pounds of meat,"[4] "twenty-five head of cattle."[5] To describe property as "the proceeds of lumber" sold is too indefinite;[6] so is an allegation "one hundred and thirty-five dollars, the property of" A.[7]

§ 161. **Much particularity has sometimes been required in the description of animals.** In many cases the particular name which points out age or sex has been required, in others not. Thus it has been held both that the word "sheep" does[8] and that it does not[9] include "lamb;" and both that an averment of stealing a horse will[10] and that it will not[11] be supported by proof of stealing a gelding. It has been held that

[1] C. *v.* Smith, 151 Mass. 491, 24 N. E. 677.

[2] C. *v.* Hayden, 150 Mass. 332, 23 N. E. 51.

[3] R. *v.* Forsyth, Russ. & R. 274.

[4] S. *v.* Morey, 2 Wis. 494.

[5] S. *v.* Brookhouse, 10 Wash. 87, 38 Pac. 862. But see Nightengale *v.* S., 94 Ga. 395, 21 S. E. 221.

[6] Grant *v.* S., 35 Fla. 581, 17 So. 225.

[7] Merwin *v.* P., 26 Mich. 298.

[8] R. *v.* Spicer, 1 C. & K. 699.

[9] R. *v.* Birket, 4 C. & P. 216.

[10] Baldwin *v.* P., 1 Scam. 304; S. *v.* Donnegan, 34 Mo. 67.

[11] S. *v.* Buckles, 26 Kan. 237; S. *v.* McDonald, 10 Mont. 21, 24 Pac. 628. Hooker *v.* S., 4 Oh. 348. In some of the cases so holding the court relied on the fact that the statute on which the prosecution was based enumerated separately *horse* and *gelding*.

a young pig was properly described as a hog,[1] and on the other hand that there was variance between allegation of cow and proof of heifer, but that the variance, being immaterial, was cured by statute.[2] Steer,[3] beef cattle,[4] and even "one beef"[5] have been held sufficient. In this confused state of the authorities statutory relief is desirable; and in some States it is provided by statute that it shall not be necessary to designate the age or sex of an animal, but shall be sufficient to describe it by such name as in the common understanding embraces it.[6]

It is enough to describe the animal by name, without adding a description of distinguishing marks,[7] such as color.

Where an animal is named, it is taken to be a live animal; and on an indictment for larceny of an animal there can be no conviction for taking a dead animal, even of the kind ordinarily used for food.[9] Where, however, a statute forbade selling short lobsters, and the statute meant dead as well as live lobsters, it was held that an indictment for selling a lobster was proved by evidence of the sale of a dead lobster.[10] The distinction is a very fine one.

[1] Lavender *v.* S., 60 Ala. 60.

[2] S. *v.* Crow, 107 Mo. 341, 17 S. W. 745.

[3] S. *v.* Lawn, 80 Mo. 241.

[4] Sanders *v.* S., 86 Ga. 717, 12 S. E. 1058.

[5] S. *v.* Baden, 42 La. Ann. 295, 7 So. 582.

[6] Mass. Stat. 1899, c. 409, § 20.

[7] S. *v.* Friend, 47 Minn. 449, 50 N. W. 692; S. *v.* Crow, 107 Mo. 341, 17 S. W. 745.

[8] P. *v.* Stanford, 64 Cal. 27, 28 Pac. 106; Mizell *v.* S., 38 Fla. 20, 20 So. 769.

[9] R. *v.* Halloway, 1 C. & P. 128; C. *v.* Young, 165 Mass. 396, 43 N. E. 118.

[10] C. *v.* Hodgkins, 170 Mass. 197, 49 N. E. 97.

§ 162. **Where an article is not always subject of larceny it is necessary to allege facts which show it to be so**; as that a railroad ticket is stamped and signed, where otherwise it would be regarded as of no value.[1] On this principle it was held that an indictment for stealing "three eggs" was not good, since they might be adders' eggs, not subjects of larceny;[2] nor an indictment for stealing "one pheasant," since the pheasant was not subject of larceny unless tame, confined, or dead.[3]

§ 163. **It is ordinarily necessary to state the number or quantity of chattels described.**[4] Thus it is not enough to allege that defendant stole "cattle;"[5] and to describe property as "a great quantity of fish, geese, and ducks,"[6] or as "divers quantities of beer,"[7] is insufficient. It has, however, been held sufficient, from the necessities of the case, to describe property as "certain house mouldings, inside doors, corner blocks, and finishing boards for houses of the value of $500."[8] And since it is not necessary to prove the quantity as stated, the omission of the allegation of number cannot be regarded as a material defect in substance, nor as prejudicial to the defendant; though, on the other hand, it is not a burden to the prosecution to insert it, since a very large number or quantity might be alleged without reference to the facts, and the actual number or

[1] McCarty *v.* S., 1 Wash. 377, 25 Pac. 299; S. *v.* Holmes, 9 Wash. 528, 37 Pac. 283.

[2] R. *v.* Cox, 1 C. & K. 494.

[3] Rough's Case, 2 East P. C. 607.

[4] 2 Hale P. C. 182.

[5] Matthews *v.* S. (Tex. Cr.), 48 S. W. 189.

[6] R. *v.* Gilbert, 1 East 583.

[7] R. *v.* Gibbs, 1 Stra. 497.

[8] Hagerman *v.* S., 54 N. J. L. 104, 23 Atl. 357.

quantity proved at the trial. In Massachusetts, where the chattels are of the same kind, it is enough to name them as "divers" chattels, without alleging the number.[1]

§ 164. **By the better opinion, it is not necessary, in describing money, to state the kinds and denominations of the separate pieces of money.** It is enough to describe the money as a certain amount of lawful money.[2] *A fortiori*, it is enough to state that "bank bills" or "paper money" to a certain amount was stolen, without further description,[3] or "copper coin" of a certain value;[4] or to aver the taking of a "United States Treasury note," without particularly describing it as a "gold certificate,"[5] or otherwise.[6]

In many jurisdictions, however, it has been held necessary, in the absence of statute, to set out the kinds and denominations of the separate pieces of money,[7] unless they were unknown, in which case it must be so alleged[8] and proved.[9]

It must be clear that no actual benefit comes to any one by this requirement of particular description,

[1] C. *v.* Butts, 124 Mass. 449.

[2] Porter *v.* S., 26 Fla. 56, 7 So. 145; C. *v.* Lincoln, 11 All. 233; Lewis *v.* S., 28 Tex. App. 140, 12 S. W. 736; S. *v.* Knowlton, 11 Wash. 512, 39 Pac. 966.

[3] C. *v.* Stebbins, 8 Gray 492; Hummel *v.* S., 17 Oh. S. 628; Kimbrough *v.* S., 28 Tex. App. 367, 13 S. W. 218.

[4] C. *v.* Gallagher, 16 Gray 240.

[5] Randall *v.* S., 53 N. J. L. 485, 22 Atl. 45.

[6] Hummel *v.* S., 17 Oh. S. 628.

[7] Thomas *v.* S., 117 Ala. 84, 23 So. 659; S. *v.* Denton, 74 Md. 517, 22 Atl. 305; Merwin *v.* P., 26 Mich. 298; Baggett *v.* S., 69 Miss. 625, 13 So. 816.

[8] Leonard *v.* S., 115 Ala. 80, 22 So. 564; Haskins *v.* P., 16 N. Y. 344.

[9] James *v.* S., 115 Ala. 83, 22 So. 565.

since the pleader has simply to enumerate all sorts of money, each in a large amount, add an averment of other money of a kind and amount to the jury unknown, and any possible state of the evidence will support some allegation in the indictment. The requirement therefore involves much labor on the part of the pleader, without any benefit. The rule first stated is evidently the better rule in actual practice.

§ 165. **A statute was early passed in most States dispensing with the necessity of a particular description of money** in an indictment for embezzlement: it need be described only as so much lawful money or so much money of the United States.[1] The cause of this statute was the impossibility of knowing what actual denominations of money were in the hands of the accused at the time of the alleged embezzlement. This impossibility did not exist in the case of other crimes; but the convenience of the statutory rule led to its extension in several States so as to cover all cases of description of money.[2] These statutes differ as to the effect of a particular description.[3]

It is constitutional to provide that all kinds of cash, checks, drafts, and other securities for money may be described as money.[4]

[1] Huffman *v.* S., 89 Ala. 33, 8 So. 28; P. *v.* Cobler, 108 Cal. 538, 41 Pac. 401; S. *v.* Pratt, 98 Mo. 482, 11 S. W. 977.

[2] P. *v.* Git, 100 Cal. 437, 34 Pac. 1080; Rains *v.* S., 137 Ind. 33, 36 N. E. 532; Brown *v.* P., 29 Mich. 232; S. *v.* Blanchard, 11 Wash. 116, 39 Pac. 377.

[3] Taylor *v.* S., 130 Ind. 66, 29 N. E. 415; Tracey *v.* S., 46 Neb. 361, 64 N. W. 1069; P. *v.* Dimick, 107 N. Y. 13, 14 N. E. 178.

[4] Randall *v.* S., 132 Ind. 539, 32 N. E. 305; P. *v.* Hanaw, 107 Mich. 337, 65 N. W. 231; see C. *v.* Smith, 129 Mass. 104.

VALUE.

§ 166. **The value of property need not be stated unless it is a material element in the crime.** A statement of value is not necessary to a sufficient description of property. If, however, the nature of the offence depends upon value, there must, of course, be an allegation of value. Thus, since at common law there could be no larceny unless the thing taken was of value, it is necessary to state the value of the stolen chattel;[1] and so of embezzlement, the indictment for which is founded on that for larceny.[2] It is also necessary to state the value of goods stolen in order to distinguish between grand and petty larceny, or between statutory degrees of larceny, where the degree depends upon the value of the property taken;[3] though in this case it would seem enough to aver the value as more than or less than a certain amount.[4]

When the value of property is not an element in the offence, as has been said, it need not be alleged. So where larceny of cattle is felony, regardless of their value, it is not necessary to allege the value.[5] So the value of the property need not be averred in robbery[6] or larceny from the person,[7] in conspiracy

[1] Parker *v.* S., 111 Ala. 72, 20 So. 641.

[2] Grant *v.* S., 35 Fla. 581, 17 So. 225.

[3] S. *v.* Perley, 86 Me. 427, 30 Atl. 74 (*semble*); Hope *v.* C., 9 Met. 134.

[4] Frisbie *v.* U. S., 157 U. S. 160.

[5] Chesnut *v.* P., 21 Col. 512, 42 Pac. 656; S. *v.* Hill, 46 La. Ann. 736, 15 So. 145; S. *v.* Young, 13 Wash. 584, 43 Pac. 881.

[6] P. *v.* Git, 100 Cal. 437, 34 Pac. 1080; S. *v.* Perley, 86 Me. 427, 30 Atl. 74; S. *v.* Howerton, 58 Mo. 581. But see C. *v.* Cahill, 12 All. 540.

[7] See C. *v.* Burke, 12 All. 182, where it was held unnecessary to *prove* a value.

to commit burglary,[1] in malicious mischief,[2] nor, in forgery, the value of the instrument forged.[3] Where the degree of the offence depends upon the value of property being more than a certain amount, if the value is not stated it is an indictment for the lower degree.[4]

If an allegation of value is unnecessarily made, it does not vitiate the indictment, being mere surplusage.[5] And if made, whether necessarily or not, it need not be exactly proved. In the ordinary case proof of any value is enough; if the offence requires a certain value to be shown, that or any greater value may be shown, no matter what the exact value alleged.[6]

§ 167. **An indictment which enumerates several things and gives a value, may aver either the individual values or the collective value.** The indictment is quite sufficient if only the collective value is given.[7] No difficulty is found if the proof covers all the goods enumerated. But if the proof fails to cover some of the goods, a difficulty arises; it is impossible to find any allegation that the goods which the proof covers were of value; and the indictment therefore is not sufficient to support a verdict of guilty as to part of the goods.[8] Thus where the indictment alleged the lar-

[1] Reinhold *v.* S., 130 Ind. 467, 30 N. E. 306.
[2] Funderbunk *v.* S., 75 Miss. 20, 21 So. 658.
[3] S. *v.* Clement, 42 La. Ann. 583, 7 So. 685.
[4] James *v.* S., 104 Ala. 20, 16 So. 94.
[5] S. *v.* Kyle, 14 Wash. 550, 45 Pac. 147.
[6] C. *v.* McKenney, 9 Gray 114.
[7] Edson *v.* S., 148 Ind. 283, 47 N. E. 625; C. *v.* Falvey, 108 Mass. 304; S. *v.* O'Connell, 144 Mo. 387, 46 S. W. 175.
[8] Hope *v.* C., 9 Met. 134.

ceny of twelve handkerchiefs, of a certain value, and the verdict found a larceny of six, the court was unable to know that the grand jury did not find that the whole value named was the value of the six handkerchiefs as to which there was an acquittal, the others being worthless; and the conviction was reversed.[1] Whether these decisions would be followed in other jurisdictions is perhaps doubtful; but it is undoubtedly better and safer to state the value of each article separately.[2]

§ 168. **It is not necessary to allege the value of money,** since the value of it is apparent.[3]

OWNERSHIP.

§ 169. **When property is mentioned in an indictment, it is usually described by stating the name of the owner.** Thus the owner of property mentioned must be stated in indictments for robbery,[4] larceny,[5] embezzlement,[6] obtaining by false pretences,[7] conspiracy to defraud,[8] malicious mischief,[9] arson or other burnings,[10] burglary or other breakings.[11] In some States

[1] C. *v.* Lavery, 101 Mass. 207.

[2] S. *v.* Kelliher, 32 Or. 240, 50 Pac. 532.

[3] Thomas *v.* S., 117 Ala. 84, 23 So. 659; P. *v.* Millan, 106 Cal. 320, 39 Pac. 605; S. *v.* Alverson, 105 Ia. 152, 74 N. W. 770; S. *v.* Howe (Or.), 44 Pac. 672.

[4] P. *v.* Ammerman, 118 Cal. 23, 50 Pac. 15.

[5] C. *v.* Morse, 14 Mass. 217.

[6] McGregor's Case, 2 Leach C. C. 932; S. *v.* Tracey, 73 Md. 447, 21 Atl. 366. *Contra* in Louisiana: S. *v.* Fricker, 45 La. Ann. 646, 12 So. 755.

[7] R. *v.* Martin, 8 A. & E. 481; Moulie *v.* S., 37 Fla. 321, 20 So. 554; Mays *v.* S., 28 Tex. App. 484, 13 S. W. 787.

[8] C. *v.* Manley, 12 Pick. 173. [9] Haworth *v.* S., Peck 89.

[10] Smoke *v.* S., 87 Ala. 143, 6 So. 376.

[11] Cooper *v.* S., 89 Ga. 222, 15 S. E. 291; C. *v.* Perris, 108 Mass

the necessity of alleging ownership is removed by statute.[1]

There are two reasons for the statement of ownership. It is an easy and the ordinary way of describing property; and in all offences which involve injuring the property of another it is the best way of alleging that the property of another than the defendant was injured.[2] If these objects are accomplished in some other way than by averring the owner, the name of the owner may be omitted, and the indictment will be at most merely formally defective, and probably good, even in form. Thus where it is alleged that the property did not belong to the defendant, the allegation of ownership may, it seems, be omitted;[3] and where an officer was indicted under a statute for the embezzlement of public funds, it was held that the ownership need not be stated.[4] So in an indictment for assault with intent to steal, where the property intended to be stolen need not be described, the ownership of it need not be stated.[5]

If the owner is unknown to the grand jury, that fact may be alleged.[6] If the ownership follows as a matter of law from other averments, it need not be expressly stated; so where property is described as

1; S. *v.* Tyrrell, 98 Mo. 354; Jackson *v.* S., 55 Wis. 589, 13 N. W. 448.

[1] S. *v.* Wright, 19 Or. 258, 24 Pac. 229; Mass. Stat. 1899, c. 409, § 18.

[2] C. *v.* Perris, 108 Mass. 1; S. *v.* Davis, 138 Mo. 107, 39 S. W. 460.

[3] S. *v.* Keena, 63 Conn. 329, 28 Atl. 522; Thomas *v.* S., 96 Ga. 311, 22 S. E. 956.

[4] S. *v.* Walton, 62 Me. 106.

[5] C. *v.* Crowley, 167 Mass. 434, 45 N. E. 766.

[6] *Ante*, § 125.

records of a court it is not necessary to allege the ownership, since the law makes all records the property of the State.[1]

§ 170. **One in actual possession of the property at the time of the offence may be laid as the owner,** whether he is a tenant of real estate[2] or a bailee of personal property.[3] If goods are stolen from a thief by a second thief, in an indictment against the latter, it is proper to lay the ownership in the first thief, since he was in possession of the goods at the time of the second taking.[4] Where a husband and wife live together, the house they live in, though her property, may be described as his dwelling-house, since he is the occupant;[5] and personal property of the wife may be laid as the husband's, since he is in possession.[6] In Alabama, however, a distinction is made; real estate of the wife may be laid as the husband's,[7] but not personal property.[8] In an indictment against a tenant for removing crops, it was proper to allege ownership in his lessor, though the latter was, in fact, tenant of the real owner.[9]

It is quite proper to allege the ownership in the true owner, though he is not the possessor.[10] So in

[1] P. v. Bussey, 82 Mich. 49, 46 N. W. 97.

[2] Hill v. S., 104 Ala. 64, 16 So. 114; Smith v. P., 115 Ill. 17, 3 N. E. 733; S. v. Lee, 95 Ia. 427, 64 N. W. 284.

[3] Waterman v. S., 116 Ind. 51, 18 N. E. 63; C. v. Blanchette, 157 Mass. 486, 32 N. E. 658; S. v. O'Connell, 144 Mo. 387, 46 S. W. 175.

[4] Ward v. P., 3 Hill 395.

[5] P. v. Coyne, 116 Cal. 295, 48 Pac. 218.

[6] Kidd v. S., 101 Ga. 528, 28 S. E. 990; Petre v. S., 35 N. J. L. 64.

[7] Young v. S., 100 Ala. 126, 14 So. 872.

[8] Johnson v. S., 100 Ala. 55, 14 So. 627.

[9] S. v. Foushee, 117 N. C. 766, 23 S. E. 247.

[10] Kennedy v. S., 31 Fla. 428, 12 So. 858; S. v. Carter, 49 S. C. 265, 27 S. E. 106.

arson by a tenant the ownership should be laid in his lessor.[1] It has, however, sometimes been held that a dwelling-house, in an indictment for burglary, or arson, or a similar crime, cannot properly be alleged to be the dwelling of any one but the actual occupant.[2]

If ownership is in a corporation, an averment that an agent or servant of the corporation is owner cannot be proved.[3] So where one railroad company owns the capital stock of a second company, it cannot be laid as owner of the cars of the latter;[4] but where the former company operates the road, owning the cars, it and not the company owning the roadbed should be alleged as owner of the cars.[5]

§ 171. **An averment of ownership, though not in accurate form, is sufficient if it connects the person named with the property as possessed of it or entitled to it.** Thus it is enough to allege that property "belongs to" a certain person,[6] or was "used and occupied by" him.[7] "Of" alone is enough; as "the City Hall of Charlestown."[8] Ownership by a partnership may, it would seem, be sufficiently charged by using the

[1] Gutgesell *v.* S. (Tex. Cr.), 43 S. W. 1016.

[2] Thomas *v.* S., 97 Ala. 3, 12 So. 409 (*semble*); S. *v.* Grimes, 50 Minn. 123, 52 N. W. 275 (*semble*); P. *v.* Gates, 15 Wend. 159. In S. *v.* Grimes it was held proper to allege that the house was the dwelling of the wife, the true owner, where she lived with her husband in the house. See Woodford *v.* P., 62 N. Y. 117.

[3] Aldridge *v.* S., 88 Ala. 113, 7 So. 48; Phillips *v.* S., 96 Ga. 293, 22 S. E. 574.

[4] Johnson *v.* S., 98 Ala. 57, 13 So. 503.

[5] Johnson *v.* S., 111 Ala. 66, 20 So. 590.

[6] S. *v.* Fox, 80 Ia. 312, 45 N. W. 874; C. *v.* Hamilton, 15 Gray 480.

[7] S. *v.* Tyrrell, 98 Mo. 354, 11 S. W. 734.

[8] C. *v.* Williams, 2 Cush. 582, 586.

firm name.[1] Ownership of a corporation must be averred by using the corporate name.[2] After the death of the owner, personal property should be laid as the property of the administrator.[3] If it is uncertain which of two persons is entitled, ownership may be stated in the alternative.[4]

§ 172. **The allegation of ownership being descriptive, must be exactly proved;**[5] and if at the trial there is a conflict of evidence as to the ownership, the question must be left to the jury.[6] Even if the allegation of ownership is unnecessary, it must, according to the general rule, be proved.[7] Under a common statute, an erroneous allegation of ownership, if the offence is otherwise sufficiently described, and the defendant not prejudiced, is not fatal.[8]

The allegation of ownership is sufficiently proved by showing that the person named was the apparent owner; a flaw in his title will not justify acquittal.[9]

§ 173. **At common law the ownership must be stated accurately; and an allegation of ownership of several where one really owns,**[10] **or by one when several own,**

[1] P. *v.* Goggins, 80 Cal. 229, 32 Pac. 206. *Contra*, Emmonds *v.* S., 87 Ala. 12, 6 So. 54.

[2] *Ante*, § 122.

[3] Walker *v.* S., 111 Ala. 29, 20 So. 612. Or of the estate, Anderson *v.* S., 48 Ala. 665.

[4] S. *v.* Ware, 44 La. Ann. 954, 11 So. 579.

[5] R. *v.* James, 2 Cox C. C. 227; C. *v.* Billings, 167 Mass. 283, 45 N. E. 910; *ante*, §§ 112, 129.

[6] P. *v.* Anderson, 80 Cal. 205, 22 Pac. 139.

[7] McLaurine *v.* S., 28 Tex. App. 530, 13 S. W. 992. But see P. *v.* Handley, 100 Cal. 370, 34 Pac. 853.

[8] P. *v.* Anderson, 80 Cal. 205, 22 Pac. 139; S. *v.* Porter, 97 Ia. 450, 66 N. W. 745; S. *v.* Nelson, 101 Mo. 477, 14 S. W. 718.

[9] S. *v.* Everage, 33 La. Ann. 120.

[10] Walker *v.* S., 111 Ala. 29, 20 So. 612.

is bad.[1] A commonly adopted statute provides that ownership may be laid in any one who owns or possesses in whole or in part; under such a statute, or under a statute making variances immaterial which do not prejudice defendant, it is enough to prove that the person named had any legal interest in the property, however slight.[2]

[1] McDowell *v.* S., 68 Miss. 348, 8 So. 508.

[2] P. *v.* Clark, 106 Cal. 32, 39 Pac. 53; C. *v.* Fitzgerald, 164 Mass. 587, 42 N. E. 119; S. *v.* Riley, 100 Mo. 493, 13 S. W. 1063.

CHAPTER XVII.

WRITTEN OR SPOKEN WORDS.

§ 174. **In all indictments for writing or speaking words, the particular words written or spoken must be set out exactly.** If the words are not exactly set out, the indictment is fatally defective.[1] The reason for this rule is, that when an offence is alleged to have been committed by words or by a writing, the defendant is entitled to take the opinion of the court on the question of the criminality of the words or writing; and for this purpose the exact words must be laid before the court. In accordance with this rule the exact language used must be set out in indictments for forgery,[2] libel,[3] and sending threatening letters.[4]

§ 175. **Where the indictment sets out words, they will be construed by the court in the sense which the writer or speaker intended.** If the language is obscure, ambiguous, or figurative, the sense is to be gathered from the context, and from the circumstances under which it is used. For this purpose it would seem that enough of the context or of the circumstances should be stated in the indictment to make the words clearly

[1] Bradlaugh *v.* R., 3 Q. B. D. 607.

[2] R. *v.* Lyon, 2 Leach C. C. 597.

[3] C. *v.* Wright, 1 Cush. 46.

[4] R. *v.* Lloyd, 2 East P. C. 1122; S. *v.* Stewart, 90 Mo. 507, 2 S. W. 790 (*semble*). In the latter case, the necessity of setting out the exact words was done away by a statute.

criminal; but if the circumstances are proved at the trial it is enough, at least after verdict.[1] If, on the other hand, the words as stated in the indictment seem clearly sufficient, so that no objection can be taken to the indictment, it is, nevertheless, possible to prove at the trial by evidence of the context or of the circumstances that they were actually not criminal.[2]

§ 176. **Not only must the exact words be set out, but the indictment must purport on its face to set them out exactly.** This must be done by express allegation, as that the *tenor* of the language used is given. The word *tenor* imports an exact copy, in words and figures; the word *purport* ("of the purport following") indicates that the substance only of the words is given.[3] It is therefore not enough, in a case where the exact words are necessary, to allege that the purport is given,[4] nor that their *substance*[5] or *effect*[6] is given. Nor is it sufficient to put the exact words within quotation marks, since such mere marks of punctuation are insufficient to convey a necessary allegation.[7] Nor is it enough, in the case of printed words, to annex the printed original to the indictment.[8]

Where the tenor of the instrument is set out, a slight misspelling which does not alter the sense does not constitute a fatal variance.[9] Nor is there a fatal

[1] C. *v.* Kneeland, 20 Pick. 206, 216.
[2] R. *v.* Bear, 2 Salk. 417.
[3] C. *v.* Wright, 1 Cush. 46, 65.
[4] C. *v.* Wright, 1 Cush. 46.
[5] C. *v.* Sweney, 10 S. & R. 173.
[6] R. *v.* Bear, 2 Salk. 417.
[7] C. *v.* Wright, 1 Cush. 46, 64.
[8] C. *v.* Tarbox, 1 Cush. 66.
[9] R. *v.* Wilson, 2 Cox C. C. 426; Allgood *v.* S., 87 Ga. 668, 13 S. E. 569.

repugnancy if the instrument is unnecessarily given a name which does not appear to be correctly applied to the instrument as set forth in the indictment. The name will be rejected as surplusage.[1]

§ 177. **Only such parts of a document as are necessary for a description of the crime need be set out**; other parts of the document need neither be set out nor described. Thus where a bank-note is set out it is not necessary to describe the ornamental devices or mottoes,[2] or the number of it or other figures in the margin;[3] so it is not necessary to describe a revenue stamp affixed to the instrument,[4] or the figures cut in a check or draft to indicate the amount,[5] or the dollar marks at the head of columns of figures,[6] or the words in the margin of a warrant on the county treasurer, "not intended as a circulating medium."[7] So in an indictment for forging a note, it is not necessary to set out the indorsements[8] or other matter on the back of the note.[9] So in setting out a libel it is not necessary to set out the date and initials at the bottom.[10]

But everything that is necessary to the instrument described must be set out. Where a bank-note was set out, but the name of the State in the margin,

[1] *Ante*, § 111.
[2] C. *v.* Bailey, 1 Mass. 62; C. *v.* Searle, 2 Binn. 332.
[3] C. *v.* Taylor, 5 Cush. 605.
[4] Miller *v.* P., 52 N. Y. 304.
[5] White *v.* T., 1 Wash. 279, 24 Pac. 447.
[6] U. S. *v.* French, 57 Fed. 382.
[7] Smith *v.* S., 29 Fla. 408, 10 So. 894.
[8] C. *v.* Adams, 7 Met. 50; Miller *v.* P., 52 N. Y. 304.
[9] U. S. *v.* Marcus, 53 Fed. 784.
[10] C. *v.* Harmon, 2 Gray 289.

which did not elsewhere appear in the note, was omitted, the note was not sufficiently set out, since the place of making was an important part of the obligation.[1]

§ 178. **Where the offence charged is not directly connected with the written instrument, there is no need of setting it out with exactness**; a description of it by name or otherwise is enough. "It can only be necessary to set out the instrument, where the court could derive assistance from seeing a copy of it on the record; as where the case turns on the nature and character of the instrument, as distinguished from its quality of good or bad."[2]

So in an indictment for larceny of a writing, such as a promissory note, the instrument, if sufficiently described, need not be fully set out.[3] So an indictment for obtaining property by passing a false bank-note is good, though the note is not set out;[4] and in an indictment for obtaining a check by false pretences, it is not necessary to give the check in full.[5] In an indictment for selling lottery tickets the tickets need not be set out;[6] nor in an indictment for selling mortgaged chattels, the mortgage;[7] and an indictment for destroying a letter in the mail is good without setting out the letter.[8]

If, however, in such a case, the instrument is

[1] C. *v.* Wilson, 2 Gray 70.
[2] Wilde, C. J., in R. *v.* Coulson, 1 Den. C. C. 592, 4 Cox C. C. 227.
[3] C. *v.* Brettun, 100 Mass. 206.
[4] R. *v.* Coulson, 1 Den. C. C. 592, 4 Cox C. C. 227.
[5] C. *v.* Coe, 115 Mass. 481.
[6] P. *v.* Taylor, 3 Den. 99.
[7] Jones *v.* S., 35 Tex. Cr. R. 565, 34 S. W. 631.
[8] Rosencrans *v.* U. S., 165 U. S. 257.

alleged in the indictment to be set forth exactly according to the tenor, though it was unnecessary to do so, the allegation must be proved, and any variance will be fatal; for the alleged tenor is the description of the instrument, and must be exactly proved as such.[1]

On an indictment for extorting money by a threat of a criminal accusation, the gist of the offence is the extortion, not the words. It is enough, therefore, to set out the substance and purport of the words; and it is enough to prove so many of the words alleged as suffice to prove the crime.[2]

§ 179. **Where it is impossible to set out the instrument exactly, it is enough to state the substance, and account for not giving the tenor**; as where it is lost or mislaid, or is under the control of the defendant himself.[3] On the same principle, it is held in this country that the tenor need not be given where the instrument is too obscene to spread on the records.[4]

§ 180. **Where the instrument is in a foreign language, the English translation must be given with the original.**[5] So where the language of the instrument does not of itself convey the full meaning, the real meaning must be explained. Thus it is not enough to set out the tenor of a railway ticket without explaining the meaning.[6] If a name is signed in

[1] U. S. *v.* Britton, 2 Mas. 464.

[2] C. *v.* Moulton, 108 Mass. 307.

[3] S. *v.* White, 98 Ia. 346, 67 N. W. 267; C. *v.* Houghton, 8 Mass. 107; P. *v.* Kingsley, 2 Cow. 522.

[4] *Ante*, § 102.

[5] R. *v.* Goldstein, R. & R. 473, 3 Brod. & B. 201; P. *v.* Ah Sum, 92 Cal. 648, 28 Pac. 680.

[6] C. *v.* Ray, 3 Gray 441.

handwriting other than that current where the indictment is found, it would seem enough to set it out without comment;[1] at any rate, it is not necessary to do more than give the name in English, and allege that it was written in foreign characters; the transliteration of the foreign form need not be given. There can be no translation of a name.[2]

LIBEL.

§ 181. An approved form of indictment for libel, omitting all unnecessary averments, is as follows: "That A, on, etc., at, etc., did write and publish a false and defamatory libel [in the form of a book[3]] of and concerning X [here insert any necessary explanatory matter], of the following tenor" [here set out the libel exactly, inserting all necessary innuendoes].[4]

It is necessary to allege that the libel was published "of and concerning" the victim of it;[5] but it is not necessary to allege that it was malicious, or was published maliciously,[6] though the allegations are commonly made. The libel must be set out exactly, as has been seen;[7] except in the uncommon case where the libel consists not in a writing but in a representation, like a libellous picture, or like hanging the victim in effigy. There, of course, it must be described.[8]

[1] Duffin *v.* P., 107 Ill. 113.
[2] Beyerline *v.* S., 147 Ind. 125, 45 N. E. 772.
[3] This is common but useless.
[4] See Bish. Dir. & F. § 620.
[5] R. *v.* Marsden, 4 M. & S. 164.
[6] R. *v.* Munslow, [1895] 1 Q. B. 758.
[7] *Ante*, § 174.
[8] See C. *v.* Dejardin, 126 Mass. 46.

It is not generally necessary to allege that the words tended to provoke a breach of the peace,[1] though that must appear from the indictment.[2]

If the words stated do not appear on their face to be libellous, such extrinsic facts as are necessary to show them to be so must be alleged by way of inducement,[3] and the meaning with which the words were used must be averred by what is known as an *innuendo*.[4] But any necessary facts must be expressly stated, apart from the innuendo. The innuendo cannot enlarge the effect of the language. If the words, either by themselves or in connection with the facts previously stated, cannot reasonably bear a libellous meaning, the indictment cannot be made good by any assertion by way of innuendo of the offensive meaning of the language.[5]

FORGERY.

§ 182. A sufficient form of indictment for forgery is this, omitting the formal averments: —

"That A, on, etc., at, etc., did falsely[6] forge and counterfeit a certain writing on paper, the tenor whereof is as follows [setting out the writing], with the intent to defraud X."[7]

[1] S. *v.* Nichols, 15 Wash. 1, 45 Pac. 647.

[2] See R. *v.* Adams, 22 Q. B. D. 66, 16 Cox C. C. 544.

[3] *Ante*, § 132.

[4] P. *v.* Collins, 102 Cal. 345, 36 Pac. 669; S. *v.* Osborn, 54 Kan. 473, 38 Pac. 572; P. *v.* Jackman, 96 Mich. 269, 55 N. W. 809; Byrd *v.* S. (Tex. Cr.), 44 S. W. 521.

[5] Shaw, C. J., in C. *v.* Snelling, 15 Pick. 321, 335.

[6] Unnecessary, since the word *forge* imports falsity. But it is ordinarily used. If the forgery is a felony, here must be added "and feloniously."

[7] Bishop, Dir. & F. § 460. A simpler form is provided in Massa-

The indictment must contain three parts: the making and falsity of the instrument; the tenor of the instrument; and the intention to defraud.

The making of the false instrument must be stated, which is ordinarily done by alleging that the defendant did forge and counterfeit the instrument. It is not necessary to describe the manner in which the forgery was accomplished.[1] Thus, if the forgery consists in an alteration of part of a document, it is enough to allege generally that he forged the document;[2] and if it is alleged more specifically that the document was altered, the exact manner of the alteration need not be stated.[3] If, however, the indictment alleges the manner of the forgery, it must be proved as alleged, since otherwise the defendant would be misled.[4]

As has been seen, the forged instrument must be set out exactly, according to its tenor.[5] And if the instrument does not on its face seem calculated to defraud, facts must be alleged so that it may appear capable of defrauding.[6] If this is not made to appear, the indictment is bad.[7]

It is not necessary to give the name of the instru-

chusetts by Stat. 1899, c. 409. "That A, with intent to injure and defraud, did forge a certain instrument purporting to be," here giving name, description, or tenor, as the pleader chooses.

[1] Bennett *v.* S., 62 Ark. 516, 36 S. W. 947; P. *v.* Van Alstine, 57 Mich. 69, 23 N. W. 594.

[2] C. *v.* Woods, 10 Gray 477.

[3] Loehr *v.* P., 132 Ill. 504, 24 N. E. 68. But see S. *v.* Riebe, 27 Minn. 315, 7 N. W. 262.

[4] P. *v.* Marion, 28 Mich. 255.

[5] *Ante*, § 174.

[6] Glenn *v.* S., 116 Ala. 483, 23 So. 1; C. *v.* Dunleay, 157 Mass. 386, 32 N. E. 356.

[7] S. *v.* Chinn, 142 Mo. 507, 44 S. W. 245.

ment; as the whole is set out, the court can judge what sort of instrument it is.[1] If the name of the instrument is given, but it is not the correct name of the instrument set out, there is, it has been held, a fatal repugnance.[2] But this is not consistent with the weight of authority, or with principle.[3]

By a common statute, in an indictment for forgery the instrument may be described by stating the name by which it is commonly known (as contract, bank-bill, promissory note) without giving the tenor.[4]

The intent to defraud must be alleged;[5] but it is not necessary to allege how it was intended to accomplish the fraud.[6]

PERJURY.

§ 183. The indictment for perjury states the substance of the proceeding in which the false testimony was given; the materiality of the testimony; the name of the officer by whom the oath was administered; and that he was authorized by law to administer the oath; the fact testified to on which perjury is assigned; and that the defendant's testimony in that behalf was wilfully and corruptly false.[7] The form of indictment was at common law very cumbersome. A sufficient form is the following: —

[1] C. *v.* Castles, 9 Gray 123.

[2] C. *v.* Lawless, 101 Mass. 32. [3] *Ante*, § 111.

[4] S. *v.* Clement, 42 La. Ann. 583, 7 So. 685; S. *v.* Wright, 9 Wash. 96, 37 P. 313; Mass. Stat. 1899, c. 409, § 15. See a case where such a statute was very narrowly interpreted. Roberts *v.* S., 72 Miss. 110, 16 So. 233.

[5] P. *v.* Mitchell, 92 Cal. 590, 28 Pac. 597.

[6] R. *v.* Powell, 2 W. Bl. 787; Mead *v.* S., 53 N. J. L. 601, 23 Atl. 264.

[7] Barnett *v.* S., 89 Ala. 165, 7 So. 414.

"That on, etc., at, etc., before Sir W. B., Chief Justice, etc., a certain issue duly joined in an action of ejectment between said defendant C. as plaintiff and T. as the defendant came on to be tried in due form of law, and was then, to wit, on the day and year aforesaid, and on divers other days afterwards, and before the taking of this inquisition by due appointments in that behalf, to wit, at Westminster aforesaid, tried by a jury of the said county in that behalf duly sworn to try the matters in question in the said issue between the said parties, upon which trial the defendant then appeared as a witness for and on behalf of himself so being such plaintiff as aforesaid in the said action, and was then and there, to wit, by and under his description duly sworn and took his corporal oath upon the Holy Gospel of God, before the said Sir W. B., that the evidence which he, the said defendant, should give to the court there and to the said jury so sworn as aforesaid touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth, the said Sir W. B. then having sufficient and competent authority to administer the said oath to him in that behalf; and the jurors aforesaid on the oath aforesaid do further present that upon the trial of the said issue, so joined between the said parties aforesaid, and in relation thereto the following questions respectively became and were material, that is to say, whether he, the said defendant, was R. T., eldest son of J. T., and whether the defendant was not A. O., the son of G. O.; and the jurors first aforesaid, upon their oath aforesaid, do further present that the said defendant being so sworn as afore-

said, upon his oath aforesaid falsely, corruptly, knowingly, wilfully, and maliciously, before the said jurors, so sworn as aforesaid, and before the said Sir W. B., did depose and swear amongst other things in substance and to the effect following, that is to say, that he, the said defendant, was R. T., the eldest son of the said J. T., and that he was not A. O., the son of G. O., whereas in truth and in fact he, the said C., was not and is not R. T., the eldest son of J. T., and whereas he was and is A. O., and son of the said G. O."[1] And even this long form was lengthened at common law by adding a formal conclusion, in the following terms: "And so the jurors aforesaid, upon their oath aforesaid, do say that the said defendant of his own wicked and corrupt mind, to wit, in manner and form aforesaid, falsely, wickedly, and corruptly did commit wilful and corrupt perjury to the great displeasure of Almighty God, in contempt of our Lady the Queen and of her laws, to the evil and pernicious example of all others in the like case offending and against the peace of our Lady the Queen, her crown and dignity." This conclusion is quite needless.

This cumbersome indictment has in several States been simplified by statute.[2] No statutory form, however, is constitutionally sufficient which does not allege the substance of the false oath, and show that the oath was authorized by law.[3]

[1] This is the indictment in the famous Tichborne Case, omitting certain obviously unnecessary averments. 2 Law Mag. & Rev. N. S. 1018.

[2] S. v. Jolly, 73 Miss. 42, 18 So. 541; S. v. Peters, 107 N. C. 876, 12 S. E. 74.

[3] S. v. Mace, 76 Me. 64.

A statutory form of indictment which is probably as simple as it can constitutionally be made has been adopted in Massachusetts,[1] and is as follows: "That in a proceeding in the course of justice before the [naming the court] on an issue within the jurisdiction of said court duly joined, and tried before a jury of the county between X as plaintiff and Y as defendant, A was lawfully sworn as a witness. Whereupon it became and was material to said issue whether [say what], and to this the said A did wilfully and corruptly testify and say in substance and effect [say what]: all his said testimony as above set forth being false, as he well knew."

An indictment for perjury committed in court must show an issue joined in court, describing the court and the proceedings. Facts must be alleged to show the jurisdiction of the court, unless the jurisdiction is plain without facts stated.[2] In case of a court of general jurisdiction, the authority of the court appears without averment of facts;[3] especially where the oath was taken in the same court in which the trial is had.[4]

It is sometimes held that the averment of competent authority is enough, without setting out facts to show jurisdiction; though if authority is averred, and the facts also are set out and show that there was no jurisdiction, the indictment is repugnant.[5]

[1] Stat. 1899, c. 409.

[2] Markham *v.* U. S., 160 U. S. 319. *Contra* in England, by statute. R. *v.* Dunning, L. R. 1 C. C. 290.

[3] Masterton *v.* S., 144 Ind. 240, 43 N. E. 138.

[4] S. *v.* Thibodaux, 49 La. Ann. 15, 21 So. 127.

[5] Pankey *v.* P., 1 Scam. 80; Maynard *v.* P., 135 Ill. 416, 25 N. E. 740; S. *v.* Cunningham, 66 Ia. 94, 23 N. W. 280.

Where the oath is extra-judicial, the indictment must show not only the authority of the magistrate who administered the oath, but also that the oath was authorized by law, and was of the sort for breach of which perjury may be brought.[1]

The indictment must aver, expressly, that the defendant was duly sworn, and thereupon gave his testimony.[2] So where the oath was contained in an affidavit, it must be shown that the affidavit became effective by being fully executed; which is sufficiently alleged, however, by averring that the affidavit was made.[3]

The substance of the false oath must be set out; it is not necessary to set it out according to the tenor.[4]

It must be expressly averred that the statement made upon oath was false,[5] and if more than one statement was made, that all were false, or which one.[6] This must be directly alleged. It is not enough, after alleging defendant's testimony that at a certain time he saw X at a certain place, to aver that X was then at a different place; it is not a direct denial of the truth of defendant's statement.[7] To say that defendant well knew his statement to be false is not formally sufficient, though under the

[1] Kerfoot *v.* C., 89 Ky. 174, 12 S. W. 189; P. *v.* Gaige, 26 Mich. 30; S. *v.* Collins, 62 Vt. 195, 19 Atl. 368.

[2] C. *v.* Wright, 166 Mass. 174, 44 N. E. 129; Brown *v.* S., 91 Wis. 245, 64 N. W. 749.

[3] P. *v.* Williams, 149 N. Y. 1, 43 N. E. 407.

[4] R. *v.* May, 1 Leach C. C. 192, 1 Doug. 193; P. *v.* Warner, 5 Wend. 271.

[5] S. *v.* Mace, 76 Me. 64. [6] U. S. *v.* Moore, 60 Fed. 738.

[7] Maddox *v.* S., 28 Tex. App. 533, 13 S. W. 861.

statutes of most States it is good, being sufficient in substance.[1] To say that defendant corruptly swore, however, has been held a sufficient allegation that he falsely swore.[2] It is enough to allege the falsity of the oath; it is not necessary to state facts which show the falsity.[3]

It must be alleged that the false testimony was material.[4] This may in most States be done by a mere allegation to that effect, without showing how,[5] or without such direct averment facts may be stated which show that the testimony was material,[6] the court passing upon the materiality.[7]

The false swearing must be charged as wilful and as knowingly done. The charge that it was corrupt, knowing, and malicious, is, however, enough to show that it was wilful;[8] and the charge that it was felonious and malicious,[9] or wilful and corrupt,[10] sufficiently indicates that it was done knowingly.

In an indictment for subornation of perjury all the requisites of the crime of perjury must be stated.[11]

[1] P. *v.* Clements, 107 N. Y. 205, 13 N. E. 782.

[2] S. *v.* Smith, 63 Vt. 201, 22 Atl. 604.

[3] S. *v.* Voorhis, 52 N. J. L. 351, 20 Atl. 26.

[4] Markham *v.* U. S., 160 U. S. 319; C. *v.* Wright, 166 Mass. 174, 44 N. E. 129.

[5] S. *v.* Jean, 42 La. Ann. 946, 8 So. 480; C. *v.* McCarty, 152 Mass. 577, 26 N. E. 140.

[6] P. *v.* Ross, 103 Cal. 425, 37 Pac. 379; S. *v.* Madigan, 57 Minn. 425, 59 N. W. 490.

[7] U. S. *v.* Singleton, 54 Fed. 488.

[8] S. *v.* Spencer, 45 La Ann. 1, 12 So. 135.

[9] C. *v.* Devine, 155 Mass. 224, 29 N. E. 515.

[10] S. *v.* Smith, 63 Vt. 201, 22 Atl. 604.

[11] Rivers *v.* S., 97 Ala. 72, 12 So. 434; S. *v.* Geer, 46 Kan. 529, 26 Pac. 1027.

Thus, the oath, if in court, must appear to have been taken in a cause depending in the court,[1] and the authority of the court must be shown.[2] Charges of perjury and of subornation of perjury may be joined in the same indictment.[3]

[1] S. *v.* Geer, 46 Kan. 529, 26 Pac. 1027.
[2] Kerfoot *v.* C., 89 Ky. 174, 12 S. W. 189.
[3] C. *v.* Devine, 155 Mass. 224, 29 N. E. 515.

CHAPTER XVIII.

INDICTMENT FOR HOMICIDE.

§ 184. THE indictment for homicide is rendered complex at common law by including in it many details, such as a description of the means and method of killing, the location and size of the wound, and similar particulars. An approved form of indictment for murder by violence is as follows: "That J. L. C., on, etc., at, etc., with force and arms, in and upon one R. C., in the peace of the Commonwealth then and there being, did make an assault, and that the said J. L. C., with a certain axe, of the value of fifty cents, which he, the said J. L. C., in both his hands then and there had and held, the said R. C., in and upon the back side of the head of him the said R. C., then and there feloniously, wilfully, and of his malice aforethought, did strike and bruise, giving to the said R. C., then and there, with the axe aforesaid, in and upon the said back side of the head of him the said R. C., one mortal wound, of which said mortal wound the said R. C. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said J. L. C., the said R. C., then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder;

against the peace of said Commonwealth, and the form of the statute in such case made and provided."[1]

The indictment for homicide by poisoning is still more cumbersome: "That G. C. H., on, etc., at, etc., in and upon one B. F. T., in the peace of the said Commonwealth then and there being, wilfully, feloniously, and of his malice aforethought, did make an assault, and to her the said B. F. T. did feloniously, wilfully, and of his malice aforethought, then and there give and administer a certain large quantity, to wit, ten grains in weight, of a certain deadly poison called strychnine, he, the said G. C. H., then and there well knowing the same to be a deadly poison, with intent that the said B. F. T. should then and there take and swallow down the same into her body, and that the said B. F. T., the said strychnine, so given and administered as aforesaid, did then and there take and swallow into her body, and by reason thereof became then and there mortally sick and distempered in her body, and of said mortal sickness and distemper did then and there languish, and languishing for the space of one half hour did there live, and afterwards, on the day and year aforesaid, did there die of the mortal sickness and distemper then and there caused by the poison aforesaid, so as aforesaid, by the said G. C. H., then and there feloniously, wilfully, and of his malice aforethought given and administered to her, the said B. F. T.: and so the jurors aforesaid, on their oath aforesaid, do say and present, that the said G. C. H., her the said B. F. T., in manner and form aforesaid, and by the means aforesaid, at W. in the county aforesaid, feloniously.

[1] C. v. Chapman, 11 Cush. 423.

wilfully, and of his malice aforethought, did kill, poison, and murder, against the peace," etc.[1]

Where the homicide is caused by neglect of a legal duty, important allegations must be inserted to charge the duty and the violation of it. A form of indictment for manslaughter by neglect to provide food is as follows: "That during all the times hereinafter mentioned, J. A., hereinafter in this count mentioned, was a poor, indigent, and destitute child of a tender age, to wit, of the age of six years, and wholly unable to support, provide for, and take care of himself; and the said P. B. D., at his request, had the care, charge, possession, and custody of the said J. A., and had undertaken the support and maintenance of the said J. A., and the finding and providing the said J. A. with reasonably sufficient and proper board and lodging, for reward to the said P. B. D. in that behalf, to wit, within the jurisdiction of the said Central Criminal Court; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. B. D., on, etc., and on divers days and times afterwards and before the death of the said J. A., as hereinafter mentioned, at, etc., in and upon the said J. A. feloniously did make divers assaults, and knowingly, wilfully, and feloniously did put, place, keep, and lodge the said J. A. for divers long spaces of time, to wit, for and during the whole of those days and times in divers rooms and apartments, then and during all that time greatly and excessively overcrowded, overcharged, and filled to excess with divers and very many other infants and persons, and then also being in an ill-ventilated,

[1] C. *v.* Hersey, 2 All. 173.

impure, foul, unwholesome, and unhealthy state, and in an unfit and improper state for the said J. A. to be put, placed, kept and lodged in. By means of which said putting, placing, keeping, and lodging the said J. A. in the said rooms and apartments, he the said J. A. afterwards, to wit, on, etc., at, etc., became and was mortally sick and ill, weak, diseased, disordered and distempered in his body, and of which said last-mentioned sickness, illness, weakness, disease, disorder, and distemper the said J. A., on and from the day and year last aforesaid, until, to wit, on, etc., at, etc., did languish, and languishing did live, and then, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county last aforesaid, and within the jurisdiction of the said court, of the said last-mentioned mortal sickness, illness, weakness, disease, disorder, and distemper did die. And so the jurors aforesaid, on their oath aforesaid, do say, that the said P. B. D., him the said J. A., in manner and form in this count aforesaid, feloniously did kill and slay, against the peace of our Lady the Queen, her crown and dignity."[1]

These long and involved forms have been much simplified by statute. Thus by the English Act of 1851[2] the indictment for murder is as follows: "That A, on, etc., at, etc., feloniously, wilfully, and of his malice aforethought did kill and murder X;" and for manslaughter, "That A., on, etc., at, etc., feloniously did kill X." This form appears to be sufficient to cover manslaughter by negligence.

The statutory forms adopted in Massachusetts[3] vary

[1] 3 Cox C. C., Append.
[2] 14 & 15 Vict. c. 100.
[3] Stat. 1899, c. 409.

slightly from those in England, chiefly in alleging a battery, in order to secure a conviction for that crime if a killing is not proved.

"That A. B. did assault and beat C. D. with intent to murder him [stating the means, if desired], and by such assault and beating did kill [1] and murder C. D." And for manslaughter, "That A. B. did assault and beat C. D., and by such assault and beating did kill C. D." A special form is provided for manslaughter by neglect.

§ 185. **Many of the allegations in the old form of indictment for homicide are useless survivals from a time when they supplied a necessary function.** Thus the allegation that the victim was "within the peace" probably goes back to a time when it was not criminal to kill an outlaw, and it was therefore essential to show that the victim was entitled to protection;[2] the allegations of the weapon and of its value were necessary at a time when the weapon with which a man was killed was forfeited as a deodand, and the sheriff or other responsible party accounted for its value;[3] and the exact statement of the time and place of death has reference to the difficult question of jurisdiction once involved when the wound was given in one place and the death occurred in another.[4] All these allegations are now unnecessary and merely formal, but they have been retained in the ordinary forms of indictment.

[1] This is inserted to secure a conviction for manslaughter if the charge of murder is not sustained.

[2] 1 P. & M. Hist. 459 (2d ed. 476).

[3] 2 P. & M. Hist. 471 (2d ed. 473).

[4] 2 Hale P. C. 163.

§ 186. **It must be expressly charged that the accused caused the death.** The statement that defendant did a violent act, such as inflicting a wound, and that the victim died as a result of the violence, is the common and sufficient way of alleging that he caused the death. Where, however, the death resulted from the neglect of the defendant, or otherwise only indirectly from any act of his, it may be necessary to allege the connection.

Where the death results from a mere non-feasance of the defendant — from his neglect to perform a legal duty — the indictment must allege the duty and the neglect of it, and must show how the death resulted from the neglect.[1] Where, however, the death results directly from the infliction of violence on the deceased by the defendant, not intentionally but negligently, it seems not necessary to do more than state an act of killing by the defendant, without charging further that the act was negligently done; and even where such violence is inflicted, not by the defendant himself, but by another for whose act the defendant has through his negligence become responsible, it seems to be enough to say that the defendant did or caused the act, without alleging a negligent omission.[2] The authority on this point is surprisingly meagre. It is to be noticed that under the English statute the allegation is simply that the defendant killed or murdered the victim.[3]

§ 187. **It is necessary at common law to aver the**

[1] R. *v.* Friend, Russ. & R. 20; R. *v.* Pocock, 5 Cox C. C. 172.

[2] R. *v.* Smith, 11 Cox C. C. 210; and see R. *v.* Michael, 2 Moo. C. C. 120; Hendrickson *v.* C., 85 Ky. 281.

[3] See R. *v.* Instan, [1893] 1 Q. B. 450.

means of killing; as, for instance, the weapon, if one was used,[1] the use of poison, or of other violence.[2] If the means was unknown it may, of course, so be stated.[3] The indictment must also show how the means was employed to produce death. Thus an allegation that the defendant "with poison did kill" the victim was held bad,[4] as was an allegation that defendant "with a knife did strike, of which mortal wound deceased died."[5] For the same reason it is not enough to allege that defendant killed deceased with a shot-gun, since it is not shown how the gun was used to produce death, whether as a club or as a fire-arm.[6] On the other hand, it is enough to aver that defendant with a gun shot deceased, without mention of bullets.[7]

Several means of killing may be stated, conjunctively, since it is quite possible that the defendant died from all.[8]

A common statute (based on the English Act of 1851) provides that the means of killing need not be stated. The same result is reached in some States by general provisions of the statutes.[9] These acts

[1] 1 East P. C. 341; Michael *v.* S., 40 Fla. —, 23 So. 944; Drye *v.* S., 14 Tex. App. 185.

[2] R. *v.* Culkin, 5 C. & P. 121.

[3] C. *v.* Martin, 125 Mass. 394.

[4] Johnson *v.* S., 90 Ga. 441, 16 S. E. 92.

[5] Littell *v.* S., 133 Ind. 577, 33 N. E. 417. This and the preceding case seem to be extreme cases.

[6] Edwards *v.* S., 27 Ark. 493.

[7] Sims *v.* C. (Ky.), 13 S. W. 1079; S. *v.* Silk, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959.

[8] *Ante*, § 141.

[9] P. *v.* Hyndman, 99 Cal. 1, 33 Pac. 782. See Mass. Stat. 1899, c. 409, § 14.

are constitutional, even where the Constitution requires a sufficient statement of the crime to be made.[1]

§ 188. **The method of killing alleged must be proved substantially, but it need not be proved exactly.** "If a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting with a pistol or by starving. But where they only differ in circumstance, as if a wound be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial."[2] On this principle an indictment for an assault with a club cannot be supported by evidence that it was with a pistol used for striking;[3] nor an assault with a knife, by proof of assault with a stick;[4] nor killing with a blow of the fist, by proof of knocking down against a stone, which killed.[5] On the other hand, where a wound was alleged to have been made with a gun, and it was proved to have been made with a pistol, the variance was immaterial, since the weapons are of the same sort, and inflict wounds of the same character;[6] so where the alleged weapon was a "railroad spade" and the one proved a shovel.[7] And where a murder with one kind of poison was alleged, and killing by the use of an-

[1] S. *v.* Faucher, 71 Mo. 460; Cathcart *v.* C., 37 Pa. 108; S. *v.* Sloan, 65 Wis. 647.

[2] 4 Bl. Com. 196.

[3] S. *v.* Braxton, 47 La. Ann. 158, 16 So. 745.

[4] Herald *v.* S. (Tex. Cr.), 35 S. W. 670.

[5] Helmerking *v.* C. (Ky.), 37 S. W. 264.

[6] Turner *v.* S., 97 Ala. 57, 12 So. 54.

[7] Willis *v.* C. (Ky.), 46 S. W. 699.

other kind of poison was proved, the variance was held immaterial.[1]

The doctrine that such a variance is immaterial is confined to indictments for homicide;[2] and it must therefore be defended on the ground that an averment of the means is really in principle unnecessary, and is therefore not to be too rigidly insisted upon.

§ 189. **The indictment for homicide must also, at common law, describe the wound, if a wound caused the death.** Such indictments once stated with particularity the location of the wound and the size and depth of it. This excessive and useless particularity has passed away. It is not now regarded as necessary to give the dimensions of the wound.[3] And so long as the cause of death is substantially described, a mistake in describing the location of the wound is by the better opinion immaterial.[4] So where the wound was alleged on the right side of the head, and proved on the left, there may be a conviction.[5] Probably a repugnant description would still be bad, in the absence of statute. Thus, an allegation that the victim was struck on the left temple, giving him thereby a mortal wound on the right temple, was held fatally repugnant;[6] and where a wound was described as on the "head and body" of the victim, the court intimated that the indictment would have been bad for

[1] Westmoreland *v.* U. S., 155 U. S. 545.

[2] C. *v.* McCarthy, 145 Mass. 575, 14 N. E. 643.

[3] C. *v.* Woodward, 102 Mass. 155; and to the same effect, Hodge *v.* S., 26 Fla. 11, 7 So. 593; Rhodes *v.* S., 128 Ind. 189, 27 N. E. 866.

[4] C. *v.* Coy, 157 Mass. 200, 32 N. E. 4.

[5] Curtis *v.* C., 87 Va. 589, 13 S. E. 73.

[6] Dias *v.* S., 7 Blackf. 20.

repugnancy at common law.[1] Nowhere is a very particular description necessary; it is enough to allege that the wound was inflicted upon the "body," which in this connection means the main trunk, excluding the head and limbs.[2]

As in the case of allegation of means, many wounds may be alleged and one proved; on the other hand, if the victim died from many wounds, it is enough to allege one.[3]

In many States it is quite unnecessary, on account of statutory simplifications of criminal pleading, to state either the dimension or the location of a wound.[4]

§ 190. **The intent with which the killing was done must be alleged, in order to show whether the offence was murder or manslaughter.** This intent must accompany the infliction of the fatal force. It is customary, but not necessary, to aver the intent with every act alleged in the indictment; it is necessary only with the averment of the fatal force.[5] It is not enough to aver the intent with the assault, if it is not repeated in connection with the fatal force.[6]

Though customary, it is not necessary, to allege that the act was done wilfully,[7] or with intent to kill.[8]

[1] S. *v.* Anderson, 98 Mo. 461, 11 S. W. 981. The defect was cured by statute.

[2] Sanchez *v.* P., 22 N. Y. 147; and see Walker *v.* S., 34 Fla. 167, 16 So. 80.

[3] S. *v.* Chiles, 44 S. C. 338, 22 S. E. 339.

[4] Jones *v.* S., 35 Ind. 122; S. *v.* Day, 4 Wash. 104, 29 Pac. 984.

[5] Blanton *v.* S., 1 Wash. 265, 24 Pac. 439; S. *v.* Duvall, 26 Wis. 415.

[6] R. *v.* Honeyman, 2 Dall. 228.

[7] S. *v.* Arnold, 107 N. C. 861, 11 S. E. 990.

[8] C. *v.* Hersey, 2 All. 173.

Where murder is divided into degrees by statute, the indictment formerly used for murder is sufficient to charge murder in the first degree, without adding the statutory words.[1] Consequently it is usual to employ the old form of indictment, and convict under it for any degree that the jury may find from the evidence; but it is possible to frame an indictment for a lower degree of the crime by using the statutory words.[2] In a few States, however, it is held that all the circumstances which are required in the statute to make a killing murder in the first degree must be alleged in the indictment.[3]

§ 191. **The formal conclusion, "and so the jurors say," is not a necessary part of the indictment.**[4] Since, however, the word *murder* is a word of art, and must be used,[5] and since it is not commonly introduced into the charging part of the indictment, the formal conclusion is a convenient place in which to use the word.

[1] Davis *v.* Utah, 151 U. S. 262; Green *v.* C., 12 All. 155; Davis *v.* S., 39 Md. 355; P. *v.* Osmond, 138 N. Y. 80, 33 N. E. 739; Weatherman *v.* C. (Va.), 19 S. E. 778.

[2] Ward *v.* S., 96 Ala. 100, 11 So. 217.

[3] S. *v.* Townsend, 66 Ia. 741; S. *v.* Lowe, 93 Mo. 547; Blanton *v.* S., 1 Wash. 265, 24 Pac. 419.

[4] Hawley *v.* C., 75 Va. 847.

[5] *Ante*, § 91.

CHAPTER XIX.

INDICTMENTS FOR LARCENY AND KINDRED CRIMES.

§ 192. THE indictment for larceny is very simple. The common-law form is as follows: "That A, on, etc., at, etc., one watch of the value, etc., of the property of X feloniously did steal, take, and carry away."[1] This cannot be greatly simplified by statute. The Massachusetts form is: "That A. B. did steal one horse, of the value of more [or less] than one hundred dollars."[2] The value is stated to show the degree of larceny.[3] This is a form of indictment of the utmost simplicity, and at the same time quite sufficient.

EMBEZZLEMENT.

§ 193. The crime of embezzlement as first established was intended as an extension of the crime of larceny to cover a new case, and it should naturally have been indicted as larceny. This, however, was not done; a new form of indictment was insisted upon. The form thus adopted was as follows: "That A, on, etc., at, etc., being then and there the servant of X, did by virtue of his said employment receive and take into his possession one gold coin, etc., of the value, etc., for and in the name and on the account of

[1] Bish. Dir. & F. § 582; *ante*, § 138.
[2] Stat. 1899, c. 409. [3] *Ante*, § 167.

the said X, and afterward did then and there fraudulently embezzle the same: and so the said A did then and there, in manner and form aforesaid, the said gold coin, the property of the said X his master, from the said X feloniously steal, take, and carry away."[1]

Since there are a number of statutes of embezzlement, differing chiefly as to the relationship between the defendant and the person injured, the indictment framed upon other statutes differs from the one above given in the allegation of such relationship and of the purpose for which the property was received.

The indictment, then, alleges the receipt of property to hold for the owner in some fiduciary way or as a bailee of some sort, and the embezzlement of the property. The indictment as originally framed concluded, as in the example given, with a charge of larceny. This is necessary in some States,[2] but not now in most.[3] It is, however, everywhere useful, since it permits a conviction for larceny if the offence proves to have been that crime rather than embezzlement.

In describing the wrongful act it is enough to aver that defendant "embezzled" the property, without stating the particulars of the embezzlement.[4] It is quite unnecessary to allege a demand and refusal.[5]

§ 194. **The indictment must state exactly the relationship between the parties on account of which the property was received.**[6] The statement must be sufficiently

[1] Bish. Dir. & F. § 403. [2] C. *v.* Pratt, 132 Mass. 246.

[3] S. *v.* Fain, 106 N. C. 760, 11 S. E. 593 (*semble*); S. *v.* Reinhart, 26 Or. 466, 38 Pac. 822.

[4] R. *v.* Hodgson, 3 C. & P. 422; C. *v.* Bennett, 118 Mass. 443.

[5] S. *v.* Comings, 54 Minn. 359, 56 N. W. 50.

[6] P. *v.* Allen, 5 Den. 76.

precise in fact to show that a certain relationship existed, and that the property was received by virtue of the relationship;[1] but it is not necessary to describe the process by which the relationship was created, or even that it was more than a *de facto* connection.[2] Thus it is enough to allege that defendant was an "employee," the statutory word, without setting out the contract or alleging the particulars of the employment;[3] and that defendant was the collector of taxes, without showing a legal appointment to such office.[4] So in an indictment for embezzlement by a guardian it is not necessary to set out the date of appointment, the court appointing, or the issuing of letters of guardianship.[5] The relationship being properly alleged, it is not necessary to allege the use that should have been made of the property.[6]

§ 195. **It is not possible in the absence of statutory authority to convict of embezzlement on an indictment for larceny.**[7] In Virginia alone, by a practice which is ancient, the indictment for simple larceny covers both common-law larceny and statutory larceny by embezzlement.[8] In several States, however, it is provided by statute that a conviction may be had for embezzlement upon an indictment for larceny. The

[1] S. *v.* Newton, 26 Oh. S. 265.

[2] S. *v.* Nicholson, 67 Md. 1.

[3] Ritter *v.* S., 111 Ind. 324, 12 N. E. 501.

[4] P. *v.* Cobler, 108 Cal. 538, 41 Pac. 401; S. *v.* Goss, 69 Me. 22.

[5] P. *v.* Page, 116 Cal. 386, 48 Pac. 326.

[6] S. *v.* Turner, 10 Wash. 94, 38 Pac. 864.

[7] C. *v.* Simpson, 9 Met. 138. See Long *v.* S. (Tex. Cr.), 46 S. W. 821.

[8] Pitsnogle *v.* C., 91 Va. 808, 22 S. E. 351.

constitutionality of such a statute has been doubted; but in view of the meagre information given by the indictment for embezzlement,[1] and of the shadowy line separating larceny from embezzlement,[2] it would seem that no constitutional rights would be infringed by the statute, and it has in fact been held constitutional.[3]

FALSE PRETENCES.

§ 196. An indictment for false pretences must state all the requisites of the crime, namely, that the defendant obtained property by means of a false pretence, that he used the false pretence with intent to obtain the property and thereby to defraud the owner, and that the owner was thereby defrauded.[4] This indictment is one of the most complex and puzzling and is not capable of much simplification. A sufficient form at common law is the following: "That A, on, etc., at, etc., feloniously[5] devising to cheat and defraud one X,[6] did then and there falsely and feloniously pretend to the said X that [stating the pretences], by means of which false pretences he the said A did then and there fraudulently and feloniously[5] obtain of the said X, of the property of the said X [stating the property obtained], of the value, etc.; whereas in truth and in fact [negativing the truth

[1] R. *v.* Hodgson, 3 C. & P. 422; C. *v.* Bennett, 118 Mass. 443.

[2] See, for example, C. *v.* James, 1 Pick. 375; C. *v.* Lannan, 153 Mass. 287, 26 N. E. 858; Hildebrand *v.* P., 56 N. Y. 394.

[3] S. *v.* Thompson, 144 Mo. 314, 46 S. W. 191; and see Huntsman *v.* S., 12 Tex. App. 619.

[4] C. *v.* Drew, 19 Pick. 179.

[5] Only if the offence is a felony.

[6] This clause is probably unnecessary.

of the pretences alleged, word for word], all of which the said A then and there well knew."[1]

A proposed statutory form was as follows: "That A. B. designedly and with intent to defraud did falsely pretend to C. D., that, etc., etc., and by means of said false pretences, which said C. D. believed and relied upon, did obtain and receive from said C. D. certain property, to wit: [mention property and value if pleader wishes] of the property of said C. D.; that the pretences so made to said C. D. were false and were known to be false by the said A. B. at the time he so made them."[2]

A great simplification of pleading has been made in Massachusetts by combining the crime of false pretences into a single crime with embezzlement and larceny, and by providing that an indictment for larceny may be supported by proof of either of these three offences.[3] As a result, an acquittal for variance by indicting for one of these offences and proving another is prevented.

The false pretences must be set out in substance, though not necessarily according to the tenor; it is not enough to allege that the property named was obtained by a false pretence.[4] On general principles it would seem sufficient, since this is a statutory crime, to charge the obtaining to be by false pretences, in the words of the statute, without setting out the pretence; the statement of the pretence being an

[1] Bish. Dir. & F. § 420.

[2] Report Mass. Commission on Crim. Plead. p. 40.

[3] Mass. Stat. 1899, c. 316; c. 409, § 24.

[4] S. *v.* Bierce, 27 Conn. 319; C. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91.

unnecessarily particular description of the means of committing the offence. Such is the more common practice in similar crimes. It was said by Judge Story that this requirement of particularity was an anomaly due to common-law analogy.[1]

The pretence as set out must appear to be sufficient in law upon which to base a prosecution for crime; and therefore the pretence must be one capable of producing fraud,[2] and not merely such expression of opinion or such absurd representation as could not have led one to act on it;[3] and it must relate to a past event, not be promissory.[4]

It must be alleged that the pretence was made to the party injured,[5] or if made to another than the party injured, it must be shown what the connection was between that person and the party injured,[6] in order that it may appear how the falsehood could have caused the fraud.[7] It is enough, however, to allege a representation to the public generally, by publication in a newspaper.[8]

Each pretence stated must be alleged to be false,[9] though a conviction may be had if any one of the pretences alleged is properly averred and proved to be false.[10] And so where the pretence is denied to be

[1] U. S. *v.* Gooding, 12 Wheat. 460, 474.
[2] Meek *v.* S., 117 Ala. 116, 23 So. 155.
[3] C. *v.* Norton, 11 All. 266.
[4] Scarlett *v.* S., 25 Fla. 717, 6 So. 767; S. *v.* Sarony, 95 Mo. 349.
[5] R. *v.* Sowerby, [1894] 2 Q. B. 173.
[6] Owens *v.* S., 83 Wis. 496, 53 N. W. 736.
[7] C. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91.
[8] R. *v.* Silverlock, [1894] 2 Q. B. 766.
[9] Pattee *v.* S., 109 Ind. 545, 10 N. E. 421; S. *v.* Palmer, 50 Kan. 318, 32 Pac. 29.
[10] R. *v.* Jennison, 9 Cox C. C. 158.

true in whole, it is enough to prove it to be untrue in part. Thus where the indictment states a representation of indebtedness, and that there was no indebtedness, it is enough to prove that there was no indebtedness such as that alleged, though there may have been a slight one;[1] and where a piece of metal was represented as gold and of great value, whereas it was of no value, it may be shown to be of copper and of some value.

It must be alleged that certain property was obtained, and the property must be sufficiently described.[2] The property must be such as comes within the meaning of the statute.[3]

It is further necessary to show that the property was obtained by means of the pretence.[4] This may in most States be alleged by necessary implication; it need not be directly stated.[5] In Massachusetts, however, there must be an explicit statement that the victim believed and was deceived by the false pretence, and was thereby induced to part with the property.[6]

It is necessary also to show that the victim was defrauded by the operation, and that the defendant intended to defraud him.[7]

[1] C. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91.

[2] Cummings *v.* S., 36 Tex. Cr. R. 152, 36 S. W. 266.

[3] R. *v.* Robinson, Bell C. C. 34; S. *v.* Black, 75 Wis. 490, 44 N. W. 635.

[4] Tennyson *v.* S., 97 Ala. 78, 12 So. 391; C. *v.* Harkins, 128 Mass. 79; Denley *v.* S. (Miss.), 12 So. 698.

[5] S. *v.* Bloodsworth, 25 Or. 83, 34 Pac. 1023.

[6] C. *v.* Dunleay, 153 Mass. 330, 26 N. E. 870.

[7] P. *v.* Thomas, 3 Hill 169.

CHAPTER XX.

INDICTMENTS FOR STATUTORY OFFENCES.

§ 197. **An indictment describing a statutory offence in the very words of the statute is ordinarily sufficient.**[1] It is doubtful whether this commonly repeated rule means anything, or makes rules for indictment of a statutory crime different from those for indicting common-law crimes. It seems to have been felt once, at any rate, that there was a difference. The opinion of Judge Story in U. S. *v.* Gooding[2] was, that great strictness was required in indictments at common law, for reasons which no longer exist; and that when entirely new crimes were created by statute, the indictment should be framed on less artificial principles. In later cases in the same court this view was quite lost sight of, and it was held that the particulars of a statutory offence must be stated as fully as of a common-law offence.[3] A partial return to the older rule appears in the latest cases, where the doctrine is suggested that the words of the statute

[1] Pounds *v.* U. S., 171 U. S. 35; Freel *v.* S., 125 Ind. 166, 25 N. E. 178; C. *v.* Connelly, 163 Mass. 539, 40 N. E. 862; P. *v.* Paquin, 74 Mich. 34, 41 N. W. 852; P. *v.* Weldon, 111 N. Y. 569, 19 N. E. 279. In Michigan, by statute, such an indictment is always sufficient after verdict. P. *v.* Ochotski (Mich.), 73 N. W. 889.

[2] 12 Wheat. 460.

[3] U. S. *v.* Cook, 17 Wall. 168, 174; U. S. *v.* Cruikshank, 92 U. S. 542, 558; U. S. *v.* Hess, 124 U. S. 483.

are presumably sufficient.[1] This course of opinion in the Supreme Court of the United States seems to have been paralleled in this country generally.

In an indictment for a statutory crime the requirement that all facts necessary to show the commission of a crime must be stated is, of course, in full effect.[2] All necessary matters of inducement must be stated.[3] Thus where a statute punishes fraudulent voting at an election for representatives in Congress, the indictment must allege a voting for such representatives;[4] where a statute punishes being armed with a dangerous weapon when arrested by an officer, the indictment must allege facts showing a legal arrest;[5] and on the same principle it has been held that an indictment (using the words of the statute) that defendant falsely pretended to be a sheriff, must aver that he pretended to be a sheriff of the Commonwealth in which the indictment was found.[6] And therefore an indictment in the language of the statute will not be sufficient unless the statute itself enumerates every ingredient of the offence.[7] It not uncommonly happens that the statute creating an offence does not enumerate all the elements of the offence. For instance, because of the relation of the offence created by a statute to some common-law offence or to another offence created by the same statute, the statute often receives an interpretation not at first

[1] Ledbetter *v.* U. S., 170 U. S. 606.

[2] U. S. *v.* Cruikshank, 92 U. S. 542.

[3] *Ante*, § 132.

[4] Blitz *v.* U. S., 153 U. S. 308.

[5] C. *v.* O'Connor, 7 All. 583.

[6] C. *v.* Wolcott, 10 Cush. 61.

[7] U. S. *v.* Potter, 56 Fed. 83; S. *v.* Whalen, 98 Ia. 662, 68 N. W. 554.

sight obvious; and the indictment is modified by this fact. Thus a statutory extension of the crime of arson to other buildings requires a malicious burning; and though malice is not mentioned in the statute, it must be alleged in the indictment.[1] So where a statute, extending the crime of larceny, punishes trespass on real estate and the removal of property, the indictment must allege that the property was annexed to the realty;[2] and where among criminal trespasses to real estate "breaking glass in a building" is forbidden, it must be alleged in the indictment to be part of the building.[3] So where a statute punished a judge or clerk of election "or any other person" who should commit certain offences at elections, it was held that the indictment must state the connection of the "other person" indicted with the election, since the statute applied only to election officials.[4]

A criminal statute, then, is often expressed in terms so general as to include many cases not intended to be covered by it; the application of the statute being in such a case limited by the interpretation put upon it, the indictment must be more particular than the statute itself, and must state a case falling not only within the letter of the statute, but also within the interpretation put upon it.[5] Thus it has sometimes been held necessary to aver in an indictment knowledge of certain facts not required by the letter of the

[1] Jesse *v.* S., 28 Miss. 100.
[2] S. *v.* Vosburg, 111 N. C. 718, 16 S. E. 392.
[3] C. *v.* Bean, 11 Cush. 414.
[4] S. *v.* Krueger, 134 Mo. 262, 35 S. W. 604.
[5] P. *v.* Taylor, 96 Mich. 576, 56 N. W. 27.

statute.[1] Examples of this rule may be stated. Thus a statute forbade feeding cows on the public streets; the indictment must charge a feeding on grass growing in the street.[2] A statute punished keeping open shop on Sunday; the indictment must state that it was kept open for purpose of selling.[3] A statute forbade conveying away a human body; the indictment must allege that it was for dissection.[4] A statute forbade killing for sale a sick or diseased animal; the indictment must allege an intention to sell for food.[5] A statute forbade altering a record; the indictment must charge an alteration intended to affect some individual's interest.[6]

§ 198. **It is better, in an indictment for a statutory offence, to use the very words of the statute, if they are sufficient**; but other language may be used, if it is equivalent.[7] Thus a house of ill-fame may be described as a house used for the purpose of prostitution and lewdness;[8] "Just known" sufficiently alleges "known within a year;"[9] "On" the highway and "in" the highway are equivalent;[10] "Intrusted to defendant for delivery to A." is equivalent to "intrusted to defendant as agent or servant for delivery."[11]

A fortiori if the term used is narrower than

[1] U. S. *v.* Carll, 105 U. S. 611; C. *v.* Boynton, 12 Cush. 499; S. *v.* Howard, 66 Minn. 309, 68 N. W. 1096; Birney *v.* S., 8 Oh. 230.

[2] C. *v.* Bean, 14 Gray 52.

[3] C. *v.* Collins, 2 Cush. 556.

[4] C. *v.* Slack, 19 Pick. 304.

[5] Schmidt *v.* S., 78 Ind. 41.

[6] Harrington *v.* S., 54 Miss. 490.

[7] Jackson *v.* S., 26 Fla. 510, 7 So. 862; S. *v.* Stubbs, 108 N. C. 774, 13 S. E. 90.

[8] S. *v.* Russell, 95 Ia. 406, 64 N. W. 281.

[9] S. *v.* Hinton, 49 La. Ann. 1354, 22 So. 617.

[10] Woods *v.* S., 67 Miss. 575, 7 So. 495.

[11] S. *v.* Washington, 41 La. Ann. 778, 6 So. 633.

the statutory term and necessarily comes within it, the indictment is sufficient.[1] Thus "whiskey" may be used for "intoxicating liquor;"[2] "steer" for "cattle;"[3] "deadly weapon" for "dangerous weapon;"[4] "box car" for "rail car."[5] An allegation that an assault was done "unlawfully, feloniously, purposely, and with premeditated malice" imports that it was done "in a rude or insolent or angry manner."[6]

If, however, the words used in the indictment differ from the statutory words, and might bear a different meaning, the indictment is not sufficient.[7] Thus "fail" cannot be used for "refuse;"[8] "used" for "resorted to" (certain premises);[9] "vagabonds" for "vagrants;"[10] "intent to strike and bruise" for "intent to inflict great bodily injury."[11]

§ 199. **Exceptions or provisos in statutes creating offences must be negatived in the indictment only when such negative is necessary to a full description of the offence.** The rule is generally stated in the following form: in case of a statute which contains an exception in the enacting clause the party pleading must show that his adversary is not within the excep-

[1] S. *v.* Richards, 76 Wis. 354, 44 N. W. 1104.

[2] Schlicht *v.* S., 56 Ind. 173.

[3] S. *v.* Abbott, 20 Vt. 537.

[4] S. *v.* Lynch, 88 Me. 195, 33 Atl. 978.

[5] S. *v.* Green, 15 Mont. 424, 39 Pac. 322.

[6] Chandler *v.* S., 141 Ind. 106, 39 N. E. 444. See *ante*, § 136.

[7] R. *v.* Gregory, L. R. 1 C. C. 77; C. *v.* Intoxicating Liquors, 97 Mass. 332.

[8] Copeland *v.* S., 97 Ala. 30, 12 So. 181.

[9] C. *v.* Stahl, 7 All. 304.

[10] Johnson *v.* S., 28 Tex. App. 562, 13 S. W. 1005.

[11] S. *v.* Clark, 80 Ia. 517, 45 N. W. 910.

tion; but, if there be an exception in a subsequent clause or subsequent statute, that is matter of defence, and is to be shown by the other party.[1] The better statement of the rule, however, appears to be that when the matter of the proviso or exception in the statute, whether it be embraced within what has been termed the enacting clause or not, enters into and becomes a part of the description of the offence, or a material qualification of the language which defines or creates the offence, the negative allegation in the indictment is requisite. But where it is a subsequent exemption, or occurs in a separate and distinct clause or part of the statute, disconnected with the statutory description of the offence, the negative averment is unnecessary.[2]

It seems that the courts do not reach different results by these different statements of the rule. For a mere proviso in an independent clause could hardly affect the definition of the crime, but would state a mere matter of excuse; it is therefore not to be dealt with in the indictment.[3] *A fortiori* when an exception is created by an act subsequently passed, it need not be negatived.[4] Even if a subsequent proviso is

[1] Bell *v.* S., 104 Ala. 79, 15 So. 557; S. *v.* Kimmerling, 124 Ind. 382, 24 N. E. 722; C. *v.* Risner (Ky.), 47 S. W. 213; C. *v.* Hart, 11 Cush. 130; P. *v.* Curtis, 95 Mich. 212, 54 N. W. 767.

[2] R. *v.* Robinson, Russ. & Ry. 321; U. S. *v.* Cook, 17 Wall. 168; Beasley *v.* P., 89 Ill. 571; Gee Wo *v.* S., 36 Neb. 241, 54 N. W. 513; Hirn *v.* S., 1 Oh. S. 15; S. *v.* O'Donnell, 10 R. I. 472.

[3] Bell *v.* S., 104 Ala. 79, 15 So. 557; Hewitt *v.* S., 121 Ind. 245, 23 N. E. 83; C. *v.* Fitchburg R. R., 10 All. 189; S. *v.* Cassady, 52 N. H. 500; S. *v.* Bryant, 111 N. C. 693, 16 S. E. 326.

[4] C. *v.* Shannihan, 145 Mass. 99, 13 N. E. 347; Jefferson *v.* P., 101 N. Y. 19.

referred to in the enacting clause (as by the phrase "except as hereinafter provided") it does not usually become part of the description of the offence, and should not be negatived.[1] A subsequent clause may, however, be so referred to as to make its provisions part of the definition of the offence dealt with in the enacting clause; and in such a case the proviso, though not in the enacting clause, must be negatived.[2]

In the application of these rules there is often much difficulty. It is not always easy to determine whether the definition of the offence includes the provisions of a subsequent clause, or (to adopt the other form of statement) whether the subsequent clause is incorporated by reference into the enacting clause. Each statute must, of course, be interpreted by the court; but certain rules of somewhat general application have been established. Thus, if it is forbidden to do an act without the consent of some one, the absence of consent must be averred in the indictment as well as the doing of the act.[3]

An indictment for an unlicensed sale of liquor, sales being permitted when licensed, must negative a license;[4] or if permitted for medical purposes, must negative such purpose.[5] An indictment for working on Sunday must negative that it was a work of neces-

[1] S. *v.* Miller, 24 Conn. 522; C. *v.* Tuttle, 12 Cush. 502; C. *v.* Jennings, 121 Mass. 47; Hart *v.* Cleis, 8 Johns. 41.

[2] R. *v.* Pratten, 6 T. R. 559; P. *v.* Telford, 56 Mich. 541, 23 N. W. 213.

[3] Blackman *v.* S., 98 Ala. 77, 13 So. 316; S. *v.* Mims, 26 Minn. 191, 2 N. W. 492.

[4] C. *v.* Crossley, 162 Mass. 515, 39 N. E. 278.

[5] Thompson *v.* S., 37 Ark. 408; Billigheimer *v.* S., 32 Oh. S. 435.

sity;[1] but not that defendant was excused from the operation of the statute for conscientious reasons.[2] Imprisonment or kidnapping without lawful authority must negative the authority.[3]

An exception need not be denied with fulness and particularity; any general words which exclude the exception are sufficient, as, for instance, "not then and there being as provided," in a certain chapter of the Public Statutes,[4] or "not having therefor any license or authority in law."[5] In bigamy, on the other hand, the proviso against punishment if the former spouse deserted or has been absent seven years need not be negatived.[6]

[1] Jensen *v.* S., 60 Wis. 577, 19 N. W. 374. See to the same effect, Mosby *v.* S., 98 Ala. 50, 13 So. 148; C. *v.* Maxwell, 2 Pick. 139.

[2] C. *v.* De Voe, 159 Mass. 101, 34 N. E. 85.

[3] Barber *v.* S., 13 Fla. 675; S. *v.* Kimmerling, 124 Ind. 382, 24 N. E. 722.

[4] S. *v.* Walsh, 14 R. I. 507.

[5] C. *v.* Gagne, 153 Mass. 205, 26 N. E. 449.

[6] C. *v.* Jennings, 121 Mass. 47; Kopke *v.* P., 43 Mich. 41, 4 N. W. 551; Fleming *v.* P., 27 N. Y. 329.

CHAPTER XXI.

COUNTS.

§ 200. AN indictment may consist of several distinct charges of crime, each independent of the other. The separate statement is, in criminal as in civil pleading, known as a *count*. The method of pleading by separate counts is primarily intended to permit the joinder of prosecution for several distinct crimes. Each count is a separate charge, complete in itself, and capable of being separately dealt with.[1]

The practice of uniting several counts in one appears to have been comparatively modern.[2] If carried to an extreme, it might become a source of "enormous injustice and oppression,"[3] as in the prosecution of Tweed, where two hundred and twenty counts were joined, and the defendant was tried on them all, and found guilty on two hundred and four.[4] But neither the comparative novelty nor the possible abuse of the practice is effective to check its use, which is well established.

The prosecution of two offences at one trial is not the only object of joinder of counts; another impor-

[1] Young *v.* R., 3 T. R. 98; U. S. *v.* Pirates, 5 Wheat. 184, 201.

[2] Lord Denman in O'Connell *v.* R., 11 Cl. & F. 155, 375.

[3] See the language of Lord Campbell in R. *v.* Rowlands, 2 Den. C. C. 364, 381; of Lord Denman in O'Connell *v.* R., 11 Cl. & F. 375; and of Allen and Rapallo, JJ., in P. *v.* Liscomb, 60 N. Y. 559.

[4] P. *v.* Liscomb, 60 N. Y. 559.

tant use of counts is to charge a single offence in more than one way. It is sometimes impossible for the pleader to know with exactness what the evidence finally produced in court will prove. While the defendant's guilt is undoubted, it may not certainly be known just how he committed the offence, or even what offence he committed. In a prosecution for murder, for instance, it may be uncertain whether the offence was committed by a wound, by a blow, or by poison; and if the pleader should charge a killing in one way, the evidence might convince the jury that it was done in another way, and an acquittal for variance would necessarily follow. It is very desirable, therefore, that some method should be found by which a pleader could so state the charge as to meet any probable state of the evidence. He cannot in a single count do this; he must make a precise charge. To allege one of two things, in the alternative, is not permitted.[1] The method adopted is that of stating the charge several times in different counts, varying it slightly in each count so that some count will be supported by any evidence likely to be presented. In this case each count is in theory an indictment for a distinct offence. There can, however, be but one punishment, since but one crime can be proved by the evidence.

In cases where an indictment might be framed with several counts, several indictments may in the Federal courts be consolidated by order of court.[2] The same rules apply to consolidation of indictments that apply to counts. So if two felonies are substan-

[1] *Ante*, § 97.

[2] U. S. R. S. § 1024; Turner *v.* U. S., 66 Fed. 280.

tially different the indictments may not be consolidated; and if this is done, a verdict will be set aside without express evidence of prejudice.[1]

§ 201. **The grand jury may in different counts of an indictment describe an offence in different ways, so as to meet any state of the evidence at the trial.**[2] So in a charge of larceny the ownership of the goods stolen may be differently stated in different counts,[3] the means of killing in an indictment for homicide,[4] the description of property,[5] as where the defendant by a single act of arson burned five houses, and each house was described in a separate count.[6] So where the defendant by a single act asaulted two persons, two assaults may be described in as many counts, each upon one of the persons assaulted.[7]

§ 202. **The grand jury may in different counts in the same indictment charge the defendant with the commission of two or more distinct offences.** This doctrine was at common law subject to a single exception in England. Since the method and incidents of trial were different in prosecutions for felony and for misdemeanor, it was not permitted to join a count for felony with one for a misdemeanor.[8] This rule is followed in this country in one State at least,[9] but

[1] McElroy *v.* U. S., 164 U. S. 76.

[2] U. S. *v.* Howell, 65 Fed. 402; C. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111.

[3] Kennedy *v.* S., 31 Fla. 428, 12 So. 858.

[4] C. *v.* Fitchburg R. R., 120 Mass. 372; Hunter *v.* S., 40 N. J. L. 495.

[5] U. S. *v.* Howell, 65 Fed. 402.

[6] R. *v.* Trueman, 8 C. & P. 727.

[7] Tanner *v.* S., 92 Ala. 1, 9 So. 613.

[8] Castro *v.* R., 6 App. Cas. 229.

[9] James *v.* S., 104 Ala. 20, 16 So. 94.

almost everywhere, in the absence of statutory prohibition, a count for felony and one for misdemeanor may be joined.[1]

It is entirely proper to join two counts for distinct felonies in the same indictment.[2] This is commonly said to be confined to cases where all of the offences charged are of the same general character, requiring the same mode of trial, the same kind of evidence, and the same kind of punishment;[3] but it would seem that the mere fact of the punishment being different would not prevent the joinder of counts.[4] On this principle it is permissible to join counts for murder and manslaughter,[5] for rape and incest,[6] for burglary or robbery and larceny,[7] for burglary or larceny and receiving stolen goods,[8] for forgery and uttering,[9] and for committing a felony and being accessory to the same felony.[10]

A fortiori counts charging a number of misdemeanors may be joined in the same indictment, though the misdemeanors are entirely distinct.[11]

[1] Herman *v.* P., 131 Ill. 594, 22 N. E. 471; C. *v.* McLaughlin, 12 Cush. 612; Hawker *v.* P., 75 N. Y. 487; Hutchison *v.* C., 82 Pa. 472.

[2] Pointer *v.* U. S., 151 U. S. 396.

[3] C. *v.* Costello, 120 Mass. 358; Korth *v.* S., 46 Neb. 631, 65 N. W. 792.

[4] Beasley *v.* P., 89 Ill. 571.

[5] Baldwin *v.* S., 12 Neb. 61, 10 N. W. 463.

[6] Porath *v.* S., 90 Wis. 527, 63 N. W. 1061.

[7] P. *v.* Wilson, 151 N. Y. 403, 45 N. E. 862; Shutte's Appeal (Pa.), 18 Atl. 635.

[8] Goodman *v.* S., 141 Ind. 35, 39 N. E. 939; C. *v.* Mullen, 150 Mass. 394, 23 N. E. 51.

[9] Lascelles *v.* S., 90 Ga. 347, 16 S. E. 945.

[10] S. *v.* Burbage, 51 S. C. 284, 28 S. E. 937.

[11] Ingraham *v.* U. S., 155 U. S. 434; Gitchell *v.* P., 146 Ill. 175, 33 N. E. 757; Stephens *v.* S., 53 N. J. L. 245, 21 Atl. 1038.

This rule, also, is usually said to be limited by the requirement that the misdemeanors must belong to the same general class of crimes, or be of the same general nature, and that they must be similarly punished.[1]

When the parties go to trial upon an indictment containing two counts wrongly joined, but there is a conviction on one only, the error is cured;[2] and the same is true if a *nolle prosequi* is entered.[3]

§ 203. **In some States it is provided by statute that two distinct crimes cannot be joined in the same indictment.** Where this rule prevails, a defendant cannot be charged as principal and as accessory in different counts of the same indictment,[4] nor with forgery and uttering,[5] nor with forgery of the names of three persons in three instruments.[6] It has even been held that though one act caused both offences, a defendant could not be indicted for resisting an officer and for assault on him.[7]

§ 204. **When two separate felonies are charged in different counts of the same indictment, it is within the discretion of the court to order all tried together, or to grant a separate trial.**[8] If in its discretion the court

[1] C. *v.* Jacobs, 152 Mass. 276, 25 N. E. 463; Hans *v.* S., 50 Neb. 150, 69 N. W. 838; Mitchell *v.* C. (Va.), 20 S. E. 892.

[2] Reed *v.* S., 147 Ind. 41, 46 N. E. 135.

[3] S. *v.* Buchanan, 1 Ire. 59.

[4] Wendell *v.* S., 46 Neb. 823, 65 N. W. 884.

[5] S. *v.* McCormack, 56 Ia. 585, 9 N. W. 916. *Contra*, P. *v.* Adler, 140 N. Y. 331, 35 N. E. 644, under a statute which made uttering a variety of forgery.

[6] Kotter *v.* P., 150 Ill. 441, 37 N. E. 932.

[7] T. *v.* Duffield, 1 Ari. 58, 25 Pac. 476.

[8] Pointer *v.* U. S., 151 U. S. 396; Benson *v.* C., 158 Mass. 164, 33 N. E. 384; Martin *v* S., 79 Wis. 165, 48 N. W. 119.

refuses separate trials, the defendant has no legal ground of complaint.[1]

In some jurisdictions, however, it is a right of the defendant, where independent felonies are charged, to have a separate trial; and if this is refused, he is entitled to a new trial.[2] Even in these jurisdictions, however, the counts are properly joined in the indictment, and the defendant can complain only if he moves for a separate trial and is refused.

§ 205. **Since the counts are quite independent, each is to be dealt with as if there was no other count.** So a plea of guilty on one count has no effect upon proceedings upon another count;[3] and a demurrer to one count may be sustained without affecting another.[4] So a good verdict on one count will stand, though there is an irregularity about the trial of another.[5]

Upon this principle it is held that the omission of a material fact in one count cannot be made good by the allegations in another count.[6] In some cases, however, it is permitted, in order to avoid useless and tiresome repetition, to make an allegation in one count, and refer back to it in the subsequent counts. It then becomes part of the subsequent counts by reference.[7] It is not always necessary to repeat in each count the merely formal parts of the indictment. Thus in Texas the conclusion against the statute need

[1] C. *v.* McCluskey, 123 Mass. 401.

[2] Castro *v.* R., 6 App. Cas. 229; S. *v.* Fidment, 35 Ia. 541; P. *v.* Aiken, 66 Mich. 460, 33 N. W. 821.

[3] Dancey *v.* S., 35 Tex. Cr. R. 615, 34 S. W. 113.

[4] Turner *v.* S., 40 Ala. 21. [5] R. *v.* Latham, 5 B. & S. 635.

[6] P. *v.* Smith, 103 Cal. 563, 37 Pac. 516; C. *v.* Crossley, 162 Mass. 515, 39 N. E. 278.

[7] C. *v.* Crossley, 162 Mass. 515, 39 N. E. 278.

not appear at the end of every count, but only at the end of the whole indictment;[1] nor in the same State need the formal commencement be repeated in subsequent counts.[2] This would not usually be true except by statute. But the caption, not being part of the indictment, need not be repeated; it applies to all the counts.[3]

§ 206. **Where an indictment contains two or more counts, the jury may find either a general verdict or a separate verdict on each count.** A general verdict may be found even where the counts are different descriptions of the same offence;[4] it may also be found where the different counts charge different offences, and there it amounts to a verdict of guilty on each count.[5] A separate verdict of guilty on one count and not guilty on another may be found; or a verdict of guilty on one count, saying nothing of the others, which amounts to a verdict of not guilty on the counts on which no verdict is found.[6] If the counts are for the same offence, there may be a verdict of guilty on one count,[7] but it would not be possible to convict on two counts separately. As but one offence has been committed, there must either be a general verdict or a verdict of guilty of a single offence.[8]

[1] Alexander *v.* S., 27 Tex. App. 533, 11 S. W. 628.

[2] Anderson *v.* S. (Tex. Cr.), 44 S. W. 824.

[3] Greenwood *v.* C. (Ky.), 11 S. W. 811; West *v.* S., 27 Tex. App. 472, 11 S. W. 482.

[4] C. *v.* Fitchburg R. R., 120 Mass. 372; Donnelly *v.* S., 26 N. J. L. 463.

[5] Herman *v.* P., 131 Ill. 594, 22 N. E. 471; C. *v.* Birdsall, 69 Pa. 482.

[6] Selvester *v.* S., 170 U. S. 262.

[7] Hathcock *v.* S., 88 Ga. 91, 13 S. E. 959.

[8] C. *v.* Fitchburg R. R., 120 Mass. 372.

If the defendant so requests before or at the time when the verdict is received, he is entitled to a separate finding on each count.[1] For the requirement that a defendant must be proved guilty beyond a reasonable doubt applies to each count, and he is entitled to have on each count a separate finding that his guilt has been so proved.[2]

§ 207. **If there is a general verdict of guilty it will be sustained, though some counts are bad, if there is a single good count.** Defendant will be sentenced upon the good count.[3] Therefore an indictment will not be quashed so long as any count in it is valid.[4] And where there is a general verdict of guilty on an indictment, on one count of which there had been a former acquittal, the general verdict will be supported by the other count.[5]

In some jurisdictions, however, it is held that a general verdict of guilty must be set aside if any one of the counts on which it was based is bad.[6]

[1] S. *v.* Toole, 106 N. C. 736, 11 S. E. 168. See S. *v.* Basserman, 54 Conn. 88, 6 Atl. 185.

[2] C. *v.* Carey, 103 Mass. 214.

[3] Claassen *v.* U. S., 142 U. S. 140; Hornsby *v.* S., 94 Ala. 55, 10 So. 522; Ochs *v.* P., 124 Ill. 399, 16 N. E. 662; Brown *v.* C., 8 Mass. 59; Parker *v.* S. (N. J. L.), 39 Atl. 651; Kane *v.* P., 3 Wend. 363; C. *v.* Prickett, 132 Pa. 371, 19 Atl. 218.

[4] C. *v.* Hawkins, 3 Gray 463; S. *v.* Mangum, 116 N. C. 998, 21 S. E. 189.

[5] S. *v.* Speight, 69 N. C. 72.

[6] O'Connell *v.* R., 11 Cl. & F. 155; P. *v.* Turner, 113 Cal. 278, 45 Pac. 331; Avirett *v.* S., 76 Md. 510, 25 Atl. 676; Jones *v.* C. (Va.), 12 S. E. 950.

PART III.

THE TRIAL.

CHAPTER XXII.

THE TIME OF TRIAL.

§ 208. **The court may fix the time for the trial of a criminal case,** provided a reasonable time for preparation is thereby allowed counsel,[1] and (subject to the same requirement) it may change the date fixed, either by setting the trial at an earlier date than that first ordered,[2] or by continuing it to a later term.[3] On the other hand, it is a matter discretionary with the court to refuse a continuance of the case, and order the trial to proceed; and the party whose motion for a continuance has been refused has ordinarily no redress.[4] In case, however, of a gross and evident abuse of discretion in refusing a continuance, a new trial will be granted.[5] The appellate court is ordinarily able to judge whether the discretion of the trial court has been abused, from the affidavits

[1] S. *v.* Lund, 49 Kan. 580, 31 Pac. 146; May *v.* S., 38 Neb. 211, 56 N. W. 804.

[2] S. *v.* Place, 127 Ind. 194, 26 N. E. 768.

[3] R. *v.* Rapp, 1 Dall. 9.

[4] Isaacs *v.* U. S., 159 U. S. 487; P. *v.* Foote, 93 Mich. 38, 52 N. W. 1036; C. *v.* Buccieri, 153 Pa. 535, 26 Atl. 228; Hite *v.* C. (Va.), 31 S. E. 895.

[5] North *v.* P., 139 Ill. 81, 28 N. E. 966; S. *v.* Lewis, 74 Mo. 222.

accompanying the motion, which may be examined by the appellate court.

§ 209. **A continuance is granted only on motion, and for cause shown.** In the practice of most States, the motion is accompanied by written affidavits, setting out the cause alleged for continuance. In a few States counter-affidavits are not allowed.[1]

A continuance may be requested because of absence of counsel, or because of failure to obtain counsel in time for trial. This is not necessarily such a cause that the trial court would be unjustified in refusing the continuance. It may properly refuse the motion, for instance, in a case where one counsel, to be sure, is absent, but others are present;[2] or where lack of diligence appears in attempting to procure counsel.[3] Granting a continuance for absence of counsel is, however, not an abuse of discretion.[4]

It is not sufficient cause for continuance at request of the State that the prosecution (through no fault of the defendant) has been unable to secure sufficient evidence.[5]

The commonest reason alleged to secure a continuance is the absence of witnesses.

§ 210. **A continuance because of the absence of a witness should be granted only in a special case.** A motion for a continuance in such a case may properly be refused for failure to show that proper diligence was

[1] Pettit *v.* S., 135 Ind. 393, 34 N. E. 1118; Miller *v.* S., 29 Neb. 437, 45 N. W. 451.

[2] Long *v.* P., 135 Ill. 435, 25 N. E. 851; P. *v.* Considine, 105 Mich. 149, 63 N. W. 196; S. *v.* Inks, 135 Mo. 678, 37 S. W. 942.

[3] Maloney *v.* Traverse, 87 Ia. 306, 54 N. W. 155.

[4] S. *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321.

[5] Benton *v.* C., 89 Va. 570, 18 S. E. 282.

used to secure the attendance of the witness;[1] for failure to show that the testimony is material,[2] or that it cannot be had from some other witness who is present or available,[3] or that it is admissible in evidence;[4] or that there is a reasonable chance of obtaining the presence of the witness if a continuance is granted.[5]

Where, however, the evidence is material and necessary, and due diligence has been used to find the witness, and he has, nevertheless, not yet been found, but can probably be found, it is error to refuse a continuance; in spite of the discretion usually accorded to the trial court, the appellate court will in such a case reverse its action.[6]

§ 211. **The refusal of a continuance for absence of a witness will be proper in any case, where the other party is willing to make certain admissions as to the testimony expected from the witness.** It is usually held to be enough if he admits that the witness if present would testify as the affidavit alleges that he would do.[7] But in the nature of things no absolute rule of law can be laid down to control the discretion of the court. "In some cases such a concession would be a very inadequate substitute for the testimony of the

[1] Sutton *v.* P., 145 Ill. 279, 34 N. E. 420; Ransbottom *v.* S., 144 Ind. 250, 43 N. E. 218; S. *v.* Belvel, 89 Ia. 405, 56 N. W. 545.

[2] Smith *v.* S., 132 Ind. 145, 31 N. E. 807; Carthaus *v.* S., 78 Wis. 560, 47 N. W. 629.

[3] S. *v.* Fiester, 32 Or. 254, 50 Pac. 561.

[4] Post *v.* S., 14 Ind. App. 452, 42 N. E. 1120.

[5] Blanks *v.* C. (Ky.), 48 S. W. 161.

[6] Pettit *v.* S., 135 Ind. 393, 34 N. E. 1118; Miller *v.* S., 29 Neb. 437, 45 N. W. 451.

[7] P. *v.* Savant, 112 Mich. 297, 70 N. W. 576; Comerford *v.* S., 23 Oh. S. 599.

absent witness. In such cases it might be proper for the court to require the facts themselves to be admitted, or to grant the postponement."[1]

In some States the right to a continuance because of the absence of a witness is regulated by statute.[2] The statutes generally provide for an admission that the witness would testify as alleged as a condition of refusing continuance; or (as in Illinois) for an admission of the truth of the facts.[3] Such a statute is constitutional.[4]

SPEEDY TRIAL.

§ 212. **The right to a speedy trial is in most States secured to one accused of crime, either by the Constitution or by a statute.** In the absence of such provision the accused has no right to demand a speedy trial.[5]

The provisions of Constitution or statute are based on an English Act, the so-called *Habeas Corpus* Act,[6] by the provisions of which a person committed for treason or felony should be indicted the next term or else bailed, and that they should be tried the second term or else discharged. Following this act, a time is usually set within which the accused person must be indicted and tried.[7] The time named in a statute is that during which he was held in the court to which application for discharge is made; time during which he was held in custody by a lower court

[1] Wells, J., in C. *v.* Donovan, 99 Mass. 425, 426.
[2] Trask *v.* P., 151 Ill. 523, 38 N. E. 248.
[3] Hickam *v.* P., 137 Ill. 75, 27 N. E. 88.
[4] Keating *v.* P., 160 Ill. 480, 43 N. E. 724.
[5] R. *v.* Haas, 1 Dall. 9.
[6] 31 Car. 2, c. 2.
[7] P. *v.* Morino, 85 Cal. 515, 24 Pac. 892; S. *v.* Miller, 43 Neb. 860, 62 N. W. 238.

does not count.[1] It has been held that the statutory right to a speedy trial may be invoked against a magistrate who is about to exercise the right he otherwise has of holding an accused person for the grand jury instead of at once deciding the matter; the charge being of an offence within his jurisdiction.[2]

The requirement of the Habeas Corpus Act cannot be evaded by discharging the prisoner and at once rearresting him on another indictment for the same cause;[3] though on his discharge he may be rearrested and held on an indictment for a substantially different cause.[4]

In order to take advantage of this right it must appear that at the time of application the accused is in actual custody. He cannot demand the benefit of the act if he is out on bail;[5] he must demand a trial, or resist a motion for continuance.[6]

The statutory provisions are directed against unreasonable delay only; if there is any sufficient reason for the delay the defendant cannot complain of a postponement. Application for discharge under the act must be made to the trial court; and the question whether there has been sufficient reason for the delay is to be determined by that court in the first instance,[7] its finding on the question being, however, subject to review on appeal.[8] Affliction of the

[1] Dulin *v.* Lillard, 91 Va. 718, 20 S. E. 821.
[2] S. *v.* Sargent, 71 Minn. 28, 73 N. W. 626.
[3] Crosby's Case, 12 Mod. 66.
[4] Brown *v.* S., 85 Ga. 713, 11 S. E. 831.
[5] S. *v.* Williams, 35 S. C. 160, 14 S. E. 309.
[6] Dillard *v.* S. (Ark.), 46 S. W. 533.
[7] *Ex parte* Fennessy, 54 Cal. 101.
[8] *Ex parte* Bull, 42 Cal. 196.

accused with an infectious disease is a sufficient cause for the postponement;[1] so is flight by the accused.[2] But an erroneous belief by the prosecutor that the defendant had left the jurisdiction will not justify a postponement beyond the statutory term.[3]

If there is unreasonable delay in bringing on the trial, the ordinary relief is a discharge of the accused from imprisonment by writ of *habeas corpus*.[4] Whether the discharge operates as a final acquittal of the crime, or merely relieves temporarily from imprisonment, depends upon the form of the statute. In some States the statute is strongly expressed (as "shall be discharged from that offence"), and the discharge is a protection from any future prosecution.[5] In other States, where the form is different, it is a mere temporary release from imprisonment.[6]

[1] C. *v.* Jailer, 7 Watts 366.
[2] R. *v.* Kirk, 12 Mod. 304.
[3] S. *v.* Radoicich, 66 Minn. 294, 69 N. W. 25.
[4] *In re* Fox, 3 Mont. 513.
[5] S. *v.* Wear, 145 Mo. 162, 46 S. W. 1099.
[6] S. *v.* Garthwaite, 23 N. J. L. 143.

CHAPTER XXIII.

PRESENCE OF THE DEFENDANT.

§ 213. **In a prosecution for felony the prisoner must be present at every moment of the trial.**[1] His presence must be shown affirmatively by the record,[2] though if it is once shown it will, in the absence of evidence to the contrary, be presumed to continue throughout the trial.[3] An amendment of the record, in accordance with the facts, to show the defendant's presence at the trial, may be permitted at any time.[4] The defendant must be present, for instance, during a discussion of the competency of a witness,[5] when the jury is charged, and at the reception of the verdict. Presence of counsel at the time is not enough. So where additional instructions are given to the jury at their request, in a case of felony, while the defendant is absent, it is reversible error, though his counsel were present at the time.[6] If the defendant had been present it would have been regular, though his counsel were absent; at least if there was no evidence of

[1] We have already seen (*ante*, § 58) that he must be present at the arraignment.

[2] S. *v.* Moran, 46 Kan. 318, 26 Pac. 754; Sperry *v.* C., 9 Leigh 623.

[3] Bolln *v.* S., 51 Neb. 581, 71 N. W. 444.

[4] C. *v.* Silcox, 161 Pa. 484, 29 Atl. 105.

[5] Adams *v.* S., 28 Fla. 511, 10 So. 106.

[6] Roberts *v.* S., 111 Ind. 340, 12 N. E. 500.

actual harm caused by the absence of counsel.[1] It is evident, therefore, that the strict insistence on the defendant's presence has become a mere form, since in reality his rights are perfectly protected if he is represented by counsel.

If the jury come in with their verdict in the defendant's absence, the error is cured by at once sending them out again, and having the verdict afterwards regularly returned while the defendant is present;[2] and it is therefore not error to inquire of the jury, in the defendant's absence, if they are agreed, and if they are not, to send them out again to deliberate further.[3]

§ 214. **Certain merely formal steps may be allowed in the defendant's absence.** These are matters which have no direct bearing on the truth of the issue, and therefore are not properly part of the trial; and the defendant's presence is not necessary to protect his interests. Such matters are the appointment of counsel,[4] the making of certain motions, such as a motion for continuance, either before arraignment[5] or after it,[6] for a change of venue,[7] to quash,[8] or to require election;[9] application to file an amended infor-

[1] P. *v.* Mayes, 113 Cal. 618, 45 Pac. 860; P. *v.* Willson, 109 N. Y. 345, 16 N. E. 540. But see Smith *v.* S., 51 Wis. 615.

[2] S. *v.* Hutchinson, 95 Ia. 566, 64 N. W. 610.

[3] Chapman *v.* S. (Tex. Cr.), 42 S. W. 559.

[4] Hall *v.* S., 132 Ind. 317, 31 N. E. 536.

[5] Kibler *v.* C., 94 Va. 804, 26 S. E. 858; Tandy *v.* S., 94 Wis. 498, 69 N. W. 160.

[6] S. *v.* Duncan, 7 Wash. 336, 35 Pac. 117.

[7] Shular *v.* S., 105 Ind. 289, 4 N. E. 870.

[8] Epps *v.* S., 102 Ind. 539, 1 N. E. 491. *Contra*, S. *v.* Clifton, 57 Kan. 448, 46 Pac. 715.

[9] S. *v.* Kendall, 56 Kan. 238, 42 Pac. 711.

mation;[1] petition to amend[2] or to prove exceptions;[3] motion for arrest of judgment or for a new trial.[4] And there is no requirement of the defendant's presence in an appellate court when a judgment is rendered affirming the sentence of the court below.[5]

§ 215. **In felonies generally the defendant may waive his privilege of being present throughout the trial**; as by his express consent, or by his voluntary absence on bail.[6] Therefore a statute which provides that a verdict may be rendered during the voluntary absence of the prisoner is constitutional.[7] But there is the highest authority for saying that this right cannot be waived, even by the express consent of the defendant, in a capital case.[8] In such a case, therefore, the prisoner must be present during every moment of the trial; and any absence, even voluntary, entitles him to a new trial.

§ 216. **In case of a misdemeanor, the defendant need not be present during the whole trial.** This rule originally covered only such offences, it would seem, as were punishable by fine; "but where a man is to receive any corporal punishment, judgment cannot

[1] S. *v.* Hasledahl, 3 N. D. 36, 53 N. W. 430.

[2] P. *v.* Southern, 118 Cal. 359, 50 Pac. 545.

[3] C. *v.* Cody, 165 Mass. 133, 42 N. E. 575.

[4] Davis *v.* S., 51 Neb. 301, 70 N. W. 984; S. *v.* Greer, 11 Wash. 244, 39 Pac. 874.

[5] Schwab *v.* Berggren, 143 U. S. 442.

[6] Sahlinger *v.* P., 102 Ill. 241; C. *v.* McCarthy, 163 Mass. 458, 40 N. E. 766; Frey *v.* Calhoun Circuit Judge, 107 Mich. 130, 64 N. W. 1047. And see Van Houton *v.* P., 22 Col. 53, 43 Pac. 137. *Contra*, Shipp *v.* S., 11 Tex. App. 46.

[7] Gore *v.* S., 52 Ark. 285, 12 S. W. 564; S. *v.* Hope, 100 Mo. 347, 13 S. W. 490.

[8] Hopt *v.* Utah, 110 U. S. 574.

be given against him in his absence. For there is a *capias pro fine*, but no process to take a man and put him on the pillory."[1] But the rule now applies to all misdemeanors, at least so far as to allow absence during the progress of the trial. A record is therefore not erroneous, in case of a misdemeanor, which does not show the defendant's presence at the trial.[2] The defendant accordingly cannot complain if the jury is charged in his absence,[3] or if the trial proceeds while he is so intoxicated that he is necessarily removed.[4] In Iowa one may be tried for a misdemeanor in his absence only if he appears by counsel.[5]

§ 217. **The defendant must not only be present, but must be in condition to make his defence.** He must be no further physically restrained than is absolutely necessary. Thus he must not be handcuffed or manacled, unless there is danger of his escape.[6] The discomfort and mortification of the shackles would tend so to affect the mind of the prisoner that he could not make his defence properly. But in an extreme case, when there is danger of escape or rescue, shackles would be justified; and the necessity must be left to the discretion of the trial court.[7] So in the case of a desperate felon it is not improper to have him surrounded by armed guards during his trial.[8]

[1] R. *v.* Templeman, 1 Salk. 55.

[2] S. *v.* Baxter, 41 Kan. 516, 21 Pac. 650; S. *v.* Lucker, 40 S. C. 549, 18 S. E. 797.

[3] S. *v.* Hale, 91 Ia. 367, 59 N. W. 281.

[4] S. *v.* Ellvin, 51 Kan. 784, 33 Pac. 547.

[5] S. *v.* Young, 86 Ia. 406, 53 N. W. 272.

[6] P. *v.* Harrington, 42 Cal. 165; *ante*, § 29.

[7] Faire *v.* S., 58 Ala. 74.

[8] S. *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

The defendant cannot be tried if he is incapable of understanding the proceedings and making his defence. If he is idiotic, insane, or unable, because deaf and dumb, to defend himself, his trial must be postponed either indefinitely, or, if his disability is temporary, until he recovers. Whether he is so unable to make defence is to be determined by a jury sworn specially to try the question.[1]

The prisoner is to stand (unless permitted by the court or by local practice to sit) at the bar. In the case of felony he cannot, in England, be permitted to sit within the bar with counsel, though communication between them may be necessary for his defence.[2] In a case of misdemeanor, especially where the defendant conducts his own defence, he may be admitted within the bar.[3] In this country the practice is much more liberal; communication is freely allowed between accused and counsel, and it is doubtless within the discretion of the court to allow a prisoner to sit by his counsel within the bar.

In England and in Massachusetts, in capital cases, the defendant, though defended by counsel, is entitled, though he does not testify, to make an unsworn statement of facts to the jury.[4] This right does not exist in other than capital cases.[5]

[1] R. *v.* Berry, 1 Q. B. D. 447.

[2] R. *v.* St. George, 9 C. & P. 483; R. *v.* Zulueta, 1 C. & K. 215.

[3] R. *v.* Lovett, 9 C. & P. 462.

[4] R. *v.* Thistlewood, 33 How. St. Tr. 894; C. *v.* McConnell, 162 Mass. 499, 39 N. E. 107.

[5] C. *v.* Burrough, 162 Mass. 513, 39 N. E. 184.

CHAPTER XXIV.

COUNSEL.

§ 218. **A prosecuting officer is elected or appointed in every district, whose duty it is to take charge of prosecutions for crime,** except, in some States, prosecutions before a magistrate or inferior court. In England all prosecutions have until lately been left to counsel employed by private parties, except for crimes in which the sovereign had a direct interest; of late years other crimes have been prosecuted by counsel employed by the government, but it is still true that no officer exists whose official duty it is to prosecute for all crimes.

In this country a prosecuting officer's duty is the preparation of prosecutions, presentation of cases to the grand jury, drawing indictments, and trying issues before the petit jury. He has general charge of the case, and has certain large powers as to the disposition of it.[1] He obtains evidence, and decides whether to permit one party to a crime to "turn state's evidence," that is, to become a witness for the prosecution against his accomplices.

His power, however, is confined to the preparation and trial of cases. He has no power to make a valid agreement that one who turns state's evidence shall not be punished,[2] nor can he commit the court as to

[1] See *post*, § 304, of *nolle prosequi*.

[2] The Whiskey Cases, 99 U. S. 594; Whitney *v.* S. (Neb.), 73 N. W. 696. But see Camron *v.* S., 32 Tex. Cr. R. 180, 22 S. W. 682.

the amount of punishment to be inflicted,[1] as that if a party pleads guilty he shall not be punished.[2]

A prosecuting attorney may be disqualified through some connection with the matter which makes him an improper person to prosecute. Thus, if he has obtained statements from the defendant by fraud he is disqualified from acting in the case;[3] as he is if having previously been counsel for the defendant he has thus in consultation obtained a knowledge of the case.[4] Personal bias against the defendant is not ordinarily a disqualification;[5] but it is held in some States that if he has been employed in a civil suit against the defendant arising out of the same transaction he is disqualified from prosecuting.[6]

§ 219. **Counsel may by leave of court be employed to assist the prosecuting officer,**[7] and even to conduct the trial of the issue, in his absence.[8] Private counsel thus employed must, however, exercise no direction or control over the proceedings; the prosecutor, being a public official, cannot delegate such power.[9] Though leave of court must be had before a private prosecutor can lawfully act, no new trial will be granted where leave was not given, if no objection was made at the time by the defendant.[10] Counsel thus employed need

[1] Myers *v.* S., 115 Ind. 554, 18 N. E. 42.
[2] S. *v.* Bain, 112 Ind. 335, 14 N. E. 232.
[3] S. *v.* Russell, 83 Wis. 330, 53 N. W. 441.
[4] S. *v.* Lewis, 96 Ia. 286, 65 N. W. 295 (*semble*).
[5] P. *v.* Hamberg, 84 Cal. 468, 24 Pac. 298.
[6] P. *v.* Bussey, 82 Mich. 49, 46 N. W. 97.
[7] P. *v.* Foote, 93 Mich. 38, 52 N. W. 1036; S. *v.* Taylor, 98 Mo 240, 11 S. W. 570; Richards *v.* S., 82 Wis. 172, 51 N. W. 652.
[8] Carlisle *v.* S., 73 Miss. 587, 19 So. 207.
[9] C. *v.* Williams, 2 Cush. 582.
[10] P. *v.* Wood, 99 Mich. 620, 58 N. W. 638.

not be a resident of the county,[1] but it has been held that he should be a member of the bar of the State.[2]

It is usually held proper to employ private counsel by leave of court to assist the prosecuting officer, even though the private counsel is employed to do so and is paid by an individual who desires conviction.[3] In some States, however, this is not permitted.[4]

§ 220. **The prosecuting officer must try the case fairly and properly, or the defendant is entitled, if convicted, to a new trial.** So an improper line of examination of a witness, reflecting wrongly on his character, is erroneous, since it prejudices the jury.[5] And a conviction will be reversed where the prosecuting attorney in a trial for seduction needlessly caused the prosecuting witness to take her baby to the stand, thus prejudicing the jury.[6] So where the prosecuting officer violated an agreement to submit the case without argument.[7]

§ 221. **Improper language of the prosecuting attorney, if prejudicial to the defendant's case, is ground for a new trial;**[8] but not if it is not shown to be prejudicial.[9]

[1] P. *v.* Thacker, 108 Mich. 652, 66 N. W. 562.

[2] S. *v.* Russell, 83 Wis. 330, 53 N. W. 441. *Contra*, S. *v.* Kent, 4 N. D. 577, 62 N. W. 631.

[3] Keyes *v.* S., 122 Ind. 527, 23 N. E. 1097; S. *v.* Rue (Minn.), 75 N. W. 235; Gardner *v.* S., 55 N. J. L. 17, 26 Atl. 30; S. *v.* Kent, 4 N. D. 577, 62 N. W. 631.

[4] C. *v.* Williams, 2 Cush. 582; Biemel *v.* S., 71 Wis. 444, 37 N. W. 244.

[5] P. *v.* Wells, 100 Cal. 459, 34 Pac. 1078; P. *v.* O'Brien, 96 Mich. 630, 56 N. W. 72.

[6] S. *v.* Carter, 8 Wash. 272, 36 Pac. 29.

[7] P. *v.* O'Brien, 96 Mich. 630, 56 N. W. 72.

[8] Williams *v.* U. S., 168 U. S. 382; P. *v.* Lange, 90 Mich. 454, 51 N. W. 534.

[9] Siberry *v.* S., 133 Ind. 677, 33 N. E. 681; P. *v.* Margeson, 99 Mich. 146, 57 N. W. 1099.

In arguing to the jury, the prosecuting officer must keep within the bounds of legitimate argument; he must confine himself to the facts proved.[1] "The weapons of wit and satire and of ridicule are all available to him so long as he keeps within the record. He may draw inferences, reject theories and hypotheses, impugn motives, and question credibility, subject only to the restriction that, in so doing, he must not get clearly outside the record, and attempt to fortify his case by his own assertions of facts, unsupported by the evidence."[2] Thus it is not legitimate for counsel to use abusive language of the defendant;[3] and if this is done in such a way as to prejudice the defendant, a new trial will be granted.[4]

It is erroneous for the prosecuting attorney to argue on facts not in evidence, or to state in the hearing of the jury the existence of such facts; and if such error was allowed to pass unrectified, a new trial will be granted.[5] So where he stated in argument that the defendant's wife was heartbroken over the crime; that he knew it, because he had heard what came out before the grand jury: it was held that a new trial should be granted.[6] But facts on record in the case, though not proved by evidence at the trial, may be stated; as that defendant was convicted in the inferior court.[7]

[1] Taylor *v.* C. (Pa.), 18 Atl. 558.

[2] S. *v.* Kent, 5 N. D. 516, 67 N. W. 1052.

[3] S. *v.* Baker, 57 Kan. 541, 46 Pac. 947.

[4] P. *v.* Greenwall, 115 N. Y. 520, 22 N. E. 180.

[5] P. *v.* Abell, 113 Mich. 80, 71 N. W. 509; Scott *v.* S., 91 Wis. 552, 65 N. W. 61.

[6] Jackson *v.* S., 116 Ind. 464, 19 N. E. 330.

[7] S. *v.* Valure, 95 Ia. 401, 64 N. W. 280

It is not error, however, for the attorney to state what he really thinks has been proved,[1] or to offer in good faith, in the hearing of the jury, evidence that is incompetent;[2] or to make an erroneous statement as to the law.[3]

It is usually held erroneous for the prosecuting attorney to state his independent belief or knowledge of defendant's guilt, that being a fact not in evidence;[4] but he may state that the evidence convinces him of defendant's guilt.[5] In a few States a conviction will not be reversed because of his expression of his independent belief in defendant's guilt.[6]

Fair comments, like remarks on the prevalence of crime and the dangers of allowing criminals to escape punishment, are legitimate.[7] In States where juries are judges of the law counsel may read articles from law books to the jury, and comment on the evidence in the light of them.[8] Where the jury have to assess the punishment, it has been held improper to inform them of the terms of a statute which permits allowances for good behavior;[9] but in other States it is within the discretion of the trial court to allow it.[10]

[1] S. *v.* Beasley, 84 Ia. 83, 50 N. W. 570.

[2] S. *v.* Kouhns, 103 Ia. 720, 73 N. W. 353.

[3] S. *v.* Toombs, 79 Ia. 741, 45 N. W. 300.

[4] Raggio *v.* P., 135 Ill. 533, 26 N. E. 377; P. *v.* Dane, 59 Mich. 550, 26 N. W. 781.

[5] P. *v.* McGuire, 89 Mich. 64, 50 N. W. 786.

[6] S. *v.* Millmeier, 102 Ia. 692, 72 N. W. 275.

[7] Siebert *v.* P., 143 Ill. 571, 32 N. E. 431; S. *v.* Valwell, 66 Vt. 558, 29 Atl. 1018.

[8] Wohlford *v.* P., 148 Ill. 296, 36 N. E. 107; Klepfer *v.* S., 121 Ind. 491, 23 N. E. 287. But see Palmer *v.* P., 138 Ill. 356, 28 N. E. 130.

[9] Farrell *v.* P., 133 Ill. 244, 24 N. E. 423.

[10] C. *v.* Hill, 145 Mass. 305, 14 N. E. 124; S. *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Improper remarks are not justified by like misconduct on the part of the defendant's counsel.[1]

§ 222. **It is erroneous for the prosecution to call the jury's attention to the defendant's failure to testify,**[2] as by stating that the defendant might have explained a suspicious circumstance.[3] The modern statutes which permit a defendant to testify on his own behalf all forbid any inference being drawn from his failure to testify; and any infringement of this protecting clause is fatal error. It has, however, been held that where the evidence is overwhelming that defendant is guilty, error of this sort is harmless and does not require reversal.[4]

It has been held that counsel for prosecution may comment on the failure of plaintiff's wife to testify, where she was competent for the defendant but not for the State;[5] and failure to call an ordinary witness is, of course, a fair subject for argument.[6]

§ 223. **If remarks of the prosecuting attorney are objectionable they must be objected to at the time;** it is too late in another court.[7] So where he has stated facts not in evidence,[8] or has stated his own opinion of defendant's guilt,[9] or has commented on defendant's failure

[1] P. *v.* Kramer, 117 Cal. 647, 49 Pac. 842.

[2] Wilson *v.* U. S., 149 U. S. 60; Baker *v.* P., 105 Ill. 452; C. *v.* Scott, 123 Mass. 239.

[3] P. *v.* Sanders, 114 Cal. 216, 46 Pac. 153.

[4] S. *v.* Ahern, 54 Minn. 195, 55 N. W. 959.

[5] C. *v.* Weber, 167 Pa. 153, 31 Atl. 481. *Contra*, where the defendant could not legally compel his wife to testify. S. *v.* Hatcher, 29 Or. 309, 44 Pac. 584.

[6] C. *v.* McCabe, 163 Mass. 98, 39 N. E. 777.

[7] P. *v.* Kramer, 117 Cal. 647, 49 Pac. 842; Boone *v.* P., 148 Ill. 440, 36 N. E. 99.

[8] C. *v.* Weber, 167 Pa. 153, 31 Atl. 481.

[9] S. *v.* Spencer, 15 Ut. 149, 49 Pac. 302.

to testify,[1] no new trial will be granted unless seasonable objection was made. The objection must take the form of a request for instruction to the jury to disregard the language, or for a discharge of the jury; and refusal of the request must be duly excepted to. Mere objection to the language is not enough.[2] In some States the error cannot be considered in the higher court unless a new trial has been asked for and refused because of it;[3] and it has been held that error would be waived if a new trial is asked for on other grounds without including this.[4]

If the court, on request, instructs the jury to disregard the improper remarks or behavior of counsel, it is generally held that the defendant cannot have a new trial because of them.[5] Sometimes the court gives as a reason for this rule that nothing more was requested by the defendant; sometimes that in view of the instructions of the court there was no prejudice. If in spite of the instructions the defendant is prejudiced, he should certainly have a new trial.[6]

§ 224. **The defendant is now entitled to be represented by counsel in any case.** Anciently in case of treason and felony a defendant was not entitled to counsel

[1] S. *v.* Hull, 18 R. I. 207, 26 Atl. 191; Martin *v.* S., 79 Wis. 165, 48 N. W. 119.

[2] S. *v.* Frelinghuysen, 43 Minn. 265, 45 N. W. 432; S. *v.* Hull, 18 R. I. 207, 26 Atl. 191. See S. *v.* Howard, 118 Mo. 127, 24 S. W. 41.

[3] Grier *v.* Johnson, 88 Ia. 99, 55 N. W. 80.

[4] P. *v.* Sansome, 98 Cal. 235, 33 Pac. 202.

[5] Palmer *v.* P., 138 Ill. 356, 28 N. E. 130; Epps *v.* S., 102 Ind. 539, 1 N. E. 491; S. *v.* Butler, 85 Me. 225, 27 Atl. 142; P. *v.* Pope, 108 Mich. 361, 66 N. W. 213.

[6] P. *v.* Ah Len, 92 Cal. 282, 28 Pac. 286; P. *v.* Treat, 77 Mich. 348, 43 N. W. 983; P. *v.* Hoch, 150 N. Y. 291, 44 N. E 976. But see Quinn *v.* P., 123 Ill. 333, 15 N. E. 46.

at the trial. Reasonable time should be given to procure counsel even to a defendant who is himself a lawyer.[1]

Under the statutes or the practice of most States, counsel will be furnished to a defendant too poor to engage one for himself, upon his application to the trial court.[2] Refusal to assign counsel to a poor person, as required by statute, is reversible error, not cured by the volunteering of an attorney not accepted by him;[3] but if he is able to hire counsel for himself counsel will not be assigned.[4] The defendant cannot choose counsel where he applies to the court; he must accept counsel assigned by the court, or employ and pay counsel of his own.[5]

Defendant's counsel are bound by the same rules as to acts at the trial as the prosecuting attorney. An argument that is legitimate for the latter is legitimate for him also;[6] and he is equally bound to refrain from illegitimate argument.[7]

[1] P. *v.* Napthaly, 105 Cal. 641, 39 Pac. 29.
[2] McDonald *v.* S., 80 Wis. 407, 50 N. W. 185.
[3] Hendryx *v.* S., 130 Ind. 265, 29 N. E. 1131.
[4] Cross *v.* S., 132 Ind. 65, 31 N. E. 473.
[5] Baker *v.* S., 86 Wis. 474, 56 N. W. 1088.
[6] C. *v.* Brownell, 145 Mass. 319, 14 N. E. 108.
[7] C. *v.* Hanley, 140 Mass. 457, 5 N. E. 468.

CHAPTER XXV.

THE JURY.

§ 225. **Issues of fact arising in a criminal case are decided by a jury.** The right to a trial by jury in a criminal case is justly regarded as most important to popular liberty. It is often erroneously supposed that it was secured by Magna Carta;[1] it really grew up accidentally, in imitation of the method of determining certain issues in civil cases, and, later, subordinate issues in criminal cases.[2] The method of trial by jury in criminal cases has in the last hundred years been adopted, with some modifications, in other countries.

The distinguishing feature of trial by jury, according to our law, is the requirement of a unanimous verdict. In other countries (like Scotland and France) which have adopted trial by jury, a verdict may be rendered by a majority; but in England and in this country the votes of the whole jury must concur in a verdict.

The petit jury, by which an issue is tried, consists of twelve men. This number has prevailed from early times.[3] So exact is this requirement that if

[1] The "judgment of his peers" there named is secured only to noblemen who are, by this provision, to be tried at the king's suit in the House of Lords. Mag. Car. § 19; Coke, 2d Inst., *ad loc.*

[2] Thayer, Prelim. Treat. Evid. 68 *et seq.*

[3] Thayer, Prelim. Treat. Evid. 89.

after verdict it appears that thirteen men were on the panel the verdict must be set aside, though of course all concurred.[1] If, however, it is discovered before verdict that thirteen men are on the panel, and the last one sworn can be pointed out, he may be removed, and the trial may then proceed with the proper number.[2]

§ 226. **Trial by jury cannot be waived at common law.** One accused of crime who pleads not guilty, thereby raising an issue of fact that must be determined, cannot consent to be tried by the court without a jury, since the common law now provides no other tribunal. If he does so consent, is tried, and is found guilty, he is entitled to a new trial.[3] Therefore, if a juror falls sick during the trial, the case cannot go on and a verdict be found by the other eleven jurors, even by the defendant's consent.[4] As statutes have often been passed permitting a waiver of trial by jury, it becomes necessary to consider their constitutionality.

§ 227. **The Constitutions of each State secure to one accused of crime the right to trial by jury.** Consequently, in cases to which the Constitution applies no statute could legally be passed which should dispense with the right. Nor can the number be reduced below twelve.[5]

In several States, the right secured is to trial by

[1] S. *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

[2] Bullard *v.* S., 38 Tex. 504.

[3] P. *v.* O'Neil, 48 Cal. 257; S. *v.* Maine, 27 Conn. 281; Harris *v.* P., 128 Ill. 585, 21 N. E. 563; P. *v.* Smith, 9 Mich. 193; Williams *v.* S., 12 Oh. S. 622.

[4] S. *v.* Mansfield, 41 Mo. 470.

[5] Collins *v.* S., 88 Ala. 212, 7 So. 260; Work *v.* S., 2 Oh. S. 296.

jury "as heretofore enjoyed;" or it is provided that the right "shall remain inviolate." In these, and perhaps in other States, it has been held that the constitutional provision does not apply in the case of small misdemeanors and violations of municipal by-laws, where trial by jury could not be demanded at the time the Constitution was adopted; and it is, accordingly, held in such States that statutes may provide for the trial of such offences by a magistrate without a jury.[1]

It is a general principle that rights secured by the Constitution, like other rights, may be waived. And upon this principle it is decided in some States that a statute providing that one accused of crime may waive trial by jury and be tried by the court is constitutional.[2] In capital cases, however, it is usually held that such a constitutional right cannot be waived, since the State is interested in the result of the trial as well as the defendant.[3]

In the case of misdemeanors it is usually held that a defendant may consent to a trial by the court, or by a jury of less than twelve men.[4] Where a statute provides for a trial by an inferior court without a jury, with a right to appeal in case of conviction to a higher court in which there is a jury, the appeal being subject to no burdensome or unreasonable

[1] Callan *v.* Wilson, 127 U. S. 540 (*semble*); S. *v.* Glenn, 54 Md. 572; McGear *v.* Woodruff, 33 N. J. L. 213; P. *v.* Fisher, 20 Barb. 652; Byers *v.* C., 42 Pa. 89; S. *v.* Conlin, 27 Vt. 318.

[2] S. *v.* Worden, 46 Conn. 349; Jones *v.* Robbins, 8 Gray 329; S. *v.* Woodling, 53 Minn. 142, 54 N. W. 1068; *In re* Staff, 63 Wis. 285.

[3] Hill *v.* P., 16 Mich. 351; Cancemi *v.* P., 18 N. Y. 128.

[4] S. *v.* Kaufman, 51 Ia. 578, 2 N. W. 275; C. *v.* Dailey, 12 Cush. 80. But see S. *v.* Tucker, 96 Ia. 276, 65 N. W. 152.

regulations, it is usually held that the statute is constitutional; since the defendant is permitted either to appeal to a jury, or by failing to do so to waive his right to trial by jury.[1] In other jurisdictions, however, such a statute has been held unconstitutional.[2]

The waiver of trial by jury must be made by the defendant personally, not by counsel;[3] and when once made the waiver cannot, it would seem, be withdrawn, except by leave of court for good cause.[4]

If the court tries an issue of fact, it is acting as a jury would act, and must make a finding of fact which takes the place of a verdict. This finding may be by a majority,[5] but if the judges are evenly divided there is no finding: it operates not as an acquittal, but as a mistrial, and there must be another trial.[6]

§ 228. **A jury is constitutionally required only when a legal issue is raised upon the pleadings.** If the plea does not raise an issue, as is the case with the so-called plea of guilty, though there may be an inquisition to determine the punishment, the Constitution does not require it to be made by a jury. A statute is therefore constitutional which provides that after a plea of guilty in a capital case the court shall determine the degree of the crime or assess the punishment. Even in a jurisdiction where trial by jury cannot be waived

[1] Beers *v.* Beers, 4 Conn. 535; Jones *v.* Robbins, 8 Gray 329; Biddle *v.* C., 13 S. & R. 405.

[2] Callan *v.* Wilson, 127 U. S. 540; Miller *v.* C., 88 Va. 618, 14 S. E. 161, 342.

[3] U. S. *v.* Shaw, 59 Fed. 110.

[4] McClellan *v.* S., 118 Ala. —, 23 So. 732. But see Cain *v.* S., 102 Ga. 610, 29 S. E. 426.

[5] As was also true in a trial of a peer by the House of Lords.

[6] League *v.* S., 36 Md. 257.

in a capital case, a man may constitutionally plead guilty, and thus avoid raising an issue.[1]

QUALIFICATIONS OF JURORS.

§ 229. The qualifications of jurors are settled in each State by statute, as are the method of summoning and empanelling them. It would be useless, therefore, to lay down any rules concerning technical qualifications, as such rules could have no general application.

At common law, the jury was summoned by the sheriff, who must return "*duodecim liberos et legales homines de viceneto;*" that is, freemen, without any personal legal disqualification, and residents of the county. If a full jury could not be obtained from the jurors summoned by the sheriff, the sheriff was ordered to distrain for jury service "*tales de circumstantibus*" (if the trial was held within the county), that is, such qualified men as he could find in the court-room or near at hand.[2] These jurors were called *talesmen.*[3]

In every State, probably, a juryman must be a citizen of the State. An alien cannot serve as a juror.[4]

§ 230. **A personal exemption of an individual does not disqualify him from service on a jury if he chooses to serve.** He is not thereby rendered incompetent, and the defendant cannot complain of his presence.[5] Thus no juryman may be challenged by either party

[1] P. *v.* Lennox, 67 Cal. 113; S. *v.* Almy, 67 N. H. 274, 28 Atl. 372; Craig *v.* S., 49 Oh. S. 415, 30 N. E. 1120.

[2] 2 Hale P. C. 264, 265.

[3] As to talesmen, see Howland *v.* Gifford, 1 Pick. 43 *n.*

[4] P. *v.* Barker, 60 Mich. 277, 27 N. W. 539; S. *v.* Vogel, 22 Wis. 471 (*semble*).

[5] C. *v.* Hayden, 163 Mass. 453, 40 N. E. 846.

because he is entitled to exemption from jury duty, for instance, because he has already served within a year,[1] or has reached a certain age,[2] or holds an office which entitles him to exemption.[3]

§ 231. **A juror must be physically able to see, hear, and comprehend the evidence and the charge.** He must, of course, be sane, and neither deaf nor blind. He is disqualified, therefore, if his eyesight is so far defective that he cannot readily follow proceedings.[4] For the same reason a juror who does not easily understand the English language is disqualified.[5]

§ 232. **A juror must be disinterested.** A real interest in one party or his cause is sufficient for disqualification. Thus one who is nearly related to the accused is disqualified,[6] and so is a relative of the victim or person injured.[7] One who has intimate business or social relations with a party is disqualified, as the business partner of the defendant,[8] or the assistant to the prosecuting attorney.[9] So one attending court as a witness to the defendant's good character is incompetent.[10]

A juror may be disqualified because of pecuniary

[1] S. *v.* Brown, 28 Or. 147, 41 Pac. 1042.

[2] S. *v.* Edgerton, 100 Ia. 63, 69 N. W. 280.

[3] S. *v.* Stunkle, 41 Kan. 456, 21 Pac. 675; P. *v.* Lange, 90 Mich. 454, 51 N. W. 534; Glassenger *v.* S., 24 Oh. S. 206; Owens *v.* S., 25 Tex. App. 552, 8 S. W. 678.

[4] Rhodes *v.* S., 128 Ind. 189, 27 N. E. 866.

[5] S. *v.* Madigan, 57 Minn. 425, 59 N. W. 490; Lyles *v.* S., 41 Tex. 172.

[6] S. *v.* Potts, 100 N. C. 457, 6 S. E. 657.

[7] P. *v.* Clark, 62 Hun 84, 16 N. Y. S. 473; S. *v.* Coella, 3 Wash. 99, 28 Pac. 28.

[8] Stumm *v.* Hummel, 39 Ia. 478. [9] Block *v.* S., 100 Ind. 357.

[10] S. *v.* Barber, 113 N. C. 711, 18 S. E. 515.

interest in the result of the trial, if the interest is direct; as where a sheriff's bailiff who served subpœnas on witnesses was incompetent, where the sheriff got no fees for the service unless the defendant were convicted.[1] So one who has given bail for the defendant is disqualified.[2] And one who has a wager, however small, on the result of the trial is clearly incompetent to sit on the jury.[3] If the interest is remote, the person is not disqualified; a citizen of a county may act as juror in a prosecution for defrauding the county.[4]

One who has contributed money toward the expenses of discovering and prosecuting those who commit a certain crime is not disqualified from serving on the jury at the trial of one accused of such a crime.[5] Nor does the fact that one is a member of an association for the detection and punishment of crime make him incompetent to sit as a juror in a prosecution for that kind of crime.[6] But if the association employs an agent to detect crime, a member is incompetent to sit as juror in a prosecution instituted by such agent.[7] And one who has signed a petition asking that a plea of murder in the second degree be received from an accused is incompetent to act as juror in his trial for murder in the first degree.[8]

[1] Zimmerman *v.* S., 115 Ind. 129, 17 N. E. 258.
[2] Brazleton *v.* S., 66 Ala. 96. [3] Cluverius *v.* C., 81 Va. 787.
[4] C. *v.* Brown, 147 Mass. 585, 18 N. E. 587.
[5] S. *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1059.
[6] S. *v.* Flack, 48 Kan. 146, 29 Pac. 571; C. *v.* Burroughs, 145 Mass. 242, 13 N. E. 884.
[7] C. *v.* Moore, 143 Mass. 136, 9 N. E. 25.
[8] C. *v.* Cleary, 148 Pa. 26, 23 Atl. 1110.

§ 233. **One whose belief or conscience would prevent him from giving proper weight to the evidence is disqualified.** So if one has conscientious scruples against capital punishment, he is on that ground disqualified;[1] but where the punishment is death or imprisonment for life, in the discretion of the jury, it has been held that such scruples do not disqualify.[2] A strong disinclination to convict on circumstantial evidence alone is held to be a disqualification;[3] and so is a similar bias against the evidence of a confessed accomplice, if such evidence is to be relied on.[4]

A belief that the offence charged is morally right and justifiable,[5] and *a fortiori* that it is legally right,[6] is a disqualification. So is a belief that no one could have committed the crime unless he was insane.[7] The fact that the juror himself openly and habitually commits the act charged is a disqualification.[8]

On the other hand, a general bias against the defence of insanity as one often abused will not, it has been held, disqualify in case the juror is able, notwithstanding, to find in the actual case fairly upon the evidence.[9]

[1] Logan *v.* U. S., 144 U. S. 263; Johnson *v.* S., 34 Neb. 257, 51 N. W. 835. *Contra*, C. *v.* Webster, 5 Cush. 295. In Davidson *v.* S., 135 Ind. 254, 34 N. E. 972, it is said to be within the discretion of the court to allow a challenge for such a cause.

[2] S. *v.* Lee, 91 Ia. 499, 60 N. W. 119.

[3] Logan *v.* U. S., 144 U. S. 263; P. *v.* Ah Chung, 54 Cal. 398; S. *v.* Leabo, 89 Mo. 247; Shafer *v.* S., 7 Tex. App. 239; Cluverius *v.* C., 81 Va. 787.

[4] P. *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68.

[5] Miles *v.* U. S., 103 U. S. 304; C. *v.* Buzzell, 16 Pick. 153.

[6] C. *v.* Austin, 7 Gray 51.

[7] C. *v.* Buccieri, 153 Pa. 535, 26 Atl. 228.

[8] Reynolds *v.* U. S., 98 U. S. 145.

[9] P. *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584.

§ 234. **One who has a prejudice against the occupation or belief of the defendant is not necessarily disqualified on that ground.** Thus where the juror could render an impartial verdict in spite of his prejudice against any one in defendant's business, he was not disqualified.[1] So where defendant carried a pistol, and the juror felt a prejudice against any one who carried a pistol.[2] Prejudice against the socialistic or anarchistic beliefs of defendant does not necessarily disqualify.[3] But if it appears that because of the prejudice the defendant is not able to render an impartial verdict, or to give the defendant's testimony the weight he would otherwise give it, the juror is disqualified.[4]

§ 235. **One who has already as a juror heard the evidence in the case is thereby disqualified again to serve as juror.** Thus a member of the grand jury which found the indictment is incompetent to sit on the trial jury.[5] So a juror in a former trial of the same issue is incompetent.[6]

One who has sat as juror in case of a prosecution of the same defendant for a similar but independent offence is not merely for that reason disqualified;[7] but if the two crimes are so connected that evidence

[1] Thiede *v.* Utah, 159 U. S. 510; S. *v.* Frelinghuysen, 43 Minn. 265, 45 N. W. 432.

[2] P. *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092.

[3] Spies *v.* Illinois, 123 U. S. 131; Spies *v.* P., 122 Ill. 1,263, 12 N. E. 865, 17 N. E. 898.

[4] Stoots *v.* S., 108 Ind. 415, 9 N. E. 380.

[5] R. *v.* Sullivan, 8 A. & E. 831 (*semble*); C. *v.* Hussey, 13 Mass. 221.

[6] French *v.* S., 85 Wis. 400, 55 N. W. 566.

[7] Howell *v.* S., 4 Ind. App. 148, 30 N. E. 714; C. *v.* Hill, 4 All. 591; Patterson *v.* S., 48 N. J. L. 381, 389, 4 Atl. 449.

presented in one case is to be presented in the other, the two being parts of the same affair, a juror in the former case is incompetent.[1]

Mere knowledge of a former conviction for a similar crime is no disqualification.[2] Nor is the fact that during a former trial of the same case the juror while present in court (not then as juror) heard some of the evidence, by which, however, he would not be influenced.[3]

§ 236. **The formation by a juror of an unexpressed opinion, not so permanently fixed that it cannot be removed by a reasonable amount of evidence, does not disqualify.** The law secures to defendants an impartial trial of the issue by an unprejudiced jury; any opinion that would interfere with an impartial trial would therefore make a juror incompetent. But on the other hand the mere formation of an impression, from casual reading or talk, which will at once cease to have effect if the supposed facts on which it is based are proved in evidence, is not enough to prejudice a juryman. This distinction is often stated as one between an opinion and an impression; sometimes, as between a fixed and an hypothetical opinion. However expressed, the real distinction is the same: if a man has made up his mind on the subject he is incompetent; if he has formed an impression on facts as they have been reported, without a fixed belief as to the truth of the facts, he is competent.

[1] Stephens *v.* S., 53 N. J. L. 245, 21 Atl. 1038.

[2] S. *v.* Scott, 1 Kan. App. 748, 42 Pac. 264, where the knowledge was obtained by being present in court during a hearing on the plea of former conviction.

[3] S. *v.* Duestrow, 137 Mo. 44, 38 S. W. 554.

These principles are recognized in the cases cited below, in some States as a result of statute.[1]

In many States there is a statute expressly providing that one shall not be disqualified as a juror because of an opinion based on rumor or newspaper reports, if, notwithstanding, he could find an impartial verdict. This statute, in spite of intimations to the contrary, seems not really to have changed the rule of law. Slight differences exist between the States, and even between decisions in the same State, as to the strictness with which the rule of law should be applied to particular facts. It seems that they all agree upon the rule of law, and that the application of the law to the facts must depend chiefly upon the impressions of the court, not largely influenced by precedent. It is therefore not worth while to examine more fully the various shades of doctrine put forth in the cases. In addition to the cases already cited, those given in the note are worth comparing.[2]

[1] Reynolds *v.* U. S., 98 U. S. 145; P. *v.* Wells, 100 Cal. 227, 34 Pac. 718; S. *v.* Willis (Conn.), 41 Atl. 820; Myers *v.* S., 97 Ga. 76, 25 S. E. 252; Coughlin *v.* P., 144 Ill. 140, 33 N. E. 1; S. *v.* Munchrath, 78 Ia. 268, 43 N. W. 211; S. *v.* Medlicott, 9 Kan. 257; C. *v.* Webster, 5 Cush. 295; P. *v.* Barker, 60 Mich. 277, 27 N. W. 539; S. *v.* Cunningham, 100 Mo. 382, 12 S. W. 376; S. *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831; P. *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; Doll *v.* S., 45 Oh. S. 445, 15 N. E. 293; Taylor *v.* C. (Pa.), 18 Atl. 558; Stagner *v.* S., 9 Tex. App. 440; Dejarnette *v.* C., 75 Va. 867; Baker *v.* S., 88 Wis. 140, 59 N. W. 570.

[2] P. *v.* Foglesong (Mich.), 74 N. W. 730, and P. *v.* Thacker, 108 Mich. 652, 66 N. W. 562; Coughlin *v.* P., 144 Ill. 140, 33 N. E. 1, and Spies *v.* P., 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; Siberry *v.* S., 149 Ind. 684, 39 N. E. 936, and Frazier *v.* S., 23 Oh. S. 551; P. *v.* Wells, 100 Cal. 227, 34 Pac. 718, and Cluck *v.* S., 40 Ind, 263; S. *v.* Philpot, 97 Ia. 365, 66 N. W. 730, and S. *v.* Gleim, 17 Mont. 17, 41 Pac. 998; P. *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616, and P. *v.* Johnston, 46 Cal. 78.

It is sometimes held that if the person has expressed an opinion as one formed and held by him, he is absolutely disqualified, and no further examination as to his actual state of mind is permitted. This appears to be based on two grounds: first, that the very expression of a definite opinion of itself gives bias to the mind; secondly, that it is as trustworthy evidence of the person's actual state of mind as an answer to a question in court would be.[1] In other States it is held that even the previous expression of an opinion does not disqualify, if the expression is not such as to show ill-will, and the juror appears able to determine the issue impartially.[2]

CHALLENGES.

§ 237. **In order to remove a juror from the panel, the party objecting to him must challenge him.** If the objection is that all the jurors were wrongly summoned, so that the whole panel is illegal, the objecting party interposes what is called a "challenge to the array." If this challenge is sustained, the whole panel is quashed, and a new one is summoned; the suit being continued meanwhile.[3] The ordinary causes for a challenge to the array are the relationship or bias of the sheriff,[4] or a failure to comply with the legal forms for summoning the jury.

If the objection is not to the whole panel, but to one or more jurors, every such juror must be objected

[1] P. *v.* Brotherton, 43 Cal. 530; Coughlin *v.* P., 144 Ill. 140, 33 N. E. 1.

[2] Myers *v.* S., 97 Ga. 76, 25 S. E. 252; S. *v.* Fox, 25 N. J. L. 566; C. *v.* Roddy, 184 Pa. 274, 39 Atl. 211.

[3] Humphries *v.* S., 100 Ga. 260, 28 S. E. 25.

[4] P. *v.* Coyodo, 40 Cal. 586.

to individually by what is known as a "challenge to the poll."

§ 238. **Challenges may be for cause or peremptory.** All challenges to the array are for cause; but each party is allowed a certain number of individual challenges without assigning any cause.

A challenge for cause, that is, because the juror is disqualified for one of the causes already stated, must allege the cause exactly; it is not enough merely to state that the juror is challenged because disqualified.[1]

Challenges for cause are either principal challenges or challenges to the favor. A "principal challenge" is allowed in a case where the facts themselves, without inference or doubt, prove disqualification as a matter of law. Upon the facts alleged being proved, the juror is dismissed by the court as disqualified. Where, however, the facts proved do not show the juror to be disqualified as a matter of law, but appear to indicate an actual bias against one party, it is necessary to determine whether the bias so shown to be possible actually exists. This is a question of fact. Where the challenge gives rise to this question of fact, it is called a "challenge to the favor."[2]

§ 239. **Peremptory challenges, without alleging cause, are allowed,** at common law, to the defendant, and commonly now to the prosecution by statute. The number allowed is fixed (in some States absolutely, in some in proportion to the number examined), and is usually greater in felonies than in misdemeanors.[3]

[1] S. *v.* Young, 104 Ia. 730, 74 N. W. 693; S. *v.* Albright, 144 Mo. 638, 46 S. W. 620.

[2] Coughlin *v.* P., 144 Ill. 140, 33 N. E. 1; P. *v.* Allen, 43 N. Y. 28.

[3] Harrison *v.* U. S., 163 U. S. 140.

At common law, where two or more persons were jointly indicted, each was entitled to the full number of peremptory challenges.[1] The language of some statutes requires, however, a different rule; so that all the defendants together are allowed no more peremptory challenges than a single defendant.[2]

By the better view, the defendant is entitled to a sufficient examination to enable him to decide whether or not to challenge peremptorily.[3] And the State has the same right.[4]

§ 240. **A juror must be challenged, if at all, before he is sworn.**[5] In order to exercise the right of challenge intelligently the defendant has a right to see each individual juror before the time for challenging.[6]

The time for interposing a challenge, and the order in which challenges shall be interposed, are matters of local practice, with respect to which States differ much. In New York, for instance, the order of challenging is elaborately fixed by statute,[7] and it is reversible error for the court to depart from this order.[8]

In the absence of statute, the order in which challenges are to be made is entirely in the discretion of the court;[9] the defendant may therefore be called

[1] 2 Hale P. C. 268.

[2] Moschell *v.* S., 53 N. J. L. 498, 22 Atl. 50; S. *v.* Sutton, 10 R. I. 159.

[3] Donovan *v.* P., 139 Ill. 412, 28 N. E. 964; S. *v.* Steeves, 29 Or. 85, 43 Pac. 947.

[4] S. *v.* Foster, 91 Ia. 164, 59 N. W. 8.

[5] R. *v.* Frost, 9 C. & P. 129, 137.

[6] Lewis *v.* U. S., 146 U. S. 370.

[7] Co. Crim. Pro., § 385; P. *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616.

[8] P. *v.* McQuade, 110 N. Y. 284, 18 N. E. 156.

[9] C. *v.* Piper, 120 Mass. 185; Schufflin *v.* S., 20 Oh. S. 233.

upon to make his peremptory challenges before the government; and *a fortiori* he cannot complain if both parties are required to make such challenges simultaneously, even though some jurors may thereby be challenged by both parties.[1]

The method of empanelling and challenging the jury differs in the different jurisdictions. In some States each juror is examined individually, and either challenged or accepted at once, before the next juror is called.[2] In other States, twelve men are called into the box and examined for cause of challenge, and peremptory challenges are not made until twelve men have been accepted as impartial.[3] In a few States the prosecution has the right to "stand aside" jurors, that is, to remove any number of them from the panel temporarily, without either accepting or challenging them. After the panel has been exhausted, if a full jury has not been obtained, these jurors are again brought in, and the prosecution must then challenge or accept them.[4] After a challenge for cause has been overruled, the party still has the right to challenge peremptorily.[5]

§ 241. **The question of fact raised by the challenge of a juror is in most States tried by the court.**[6] Formerly a doubtful question of fact arising out of a challenge

[1] Pointer *v.* U. S., 151 U. S. 396.

[2] St. Clair *v.* U. S., 154 U. S. 134; S. *v.* Potter, 18 Conn. 166.

[3] Rutherford *v.* S., 32 Neb. 714, 49 N. W. 701; Lamb *v.* S., 36 Wis. 424.

[4] C. *v.* O'Brien, 140 Pa. 555, 21 Atl. 385.

[5] Barber *v.* S., 13 Fla. 675.

[6] Reynolds *v.* U. S., 98 U. S. 145; Garlitz *v.* S., 71 Md. 293, 18 Atl. 39; C. *v.* Walsh, 124 Mass. 32; S. *v.* Cunningham, 100 Mo. 382, 12 S. W. 376; Jackson *v.* C., 23 Grat. 919.

was determined by a special jury of "triers;"[1] and this practice still persists in some jurisdictions.[2] The challenged juror is required to answer on oath (called answering on his "*voir dire*") such proper questions as are put to him by the challenging party, and other evidence may be produced. The admission of evidence and the conduct of the examination are entirely in the discretion of the court.[3] If the evidence leaves the existence of prejudice on the part of the juror doubtful, it seems that he should be rejected.[4]

The finding of a jury of triers cannot be set aside as against the fact;[5] and it would seem that the finding of the court, under the common practice, upon a challenge to the favor should be dealt with in the same way. In some States such a finding cannot be examined.[6] A finding on a challenge for a principal cause, since it involves a question of law, may, of course, be reviewed in a clear case; and in many States no distinction is made in this respect between a challenge for principal cause and a challenge to the favor.[7]

[1] 3 Bl. Com. 363.

[2] Miles *v.* U. S., 103 U. S. 304; P. *v.* Voll, 43 Cal. 166; P. *v.* Honeyman, 3 Den. 121.

[3] S. *v.* Buxton, 89 Ia. 573, 57 N. W. 417; C. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111. See, however, P. *v.* Honeyman, 3 Den. 121, where the issue is tried by a jury of triers.

[4] P. *v.* Brotherton, 43 Cal. 530 (but see s. c. 47 Cal. 388); Dejarnette *v.* C., 75 Va. 867.

[5] P. *v.* Allen, 43 N. Y. 28.

[6] Moschell *v.* S., 53 N. J. L. 498, 22 Atl. 50; S. *v.* Haines, 36 S. C. 504, 15 S. E. 555.

[7] P. *v.* Wong Ark, 96 Cal. 125, 30 Pac. 1115; Coughlin *v.* P., 144 Ill. 140, 33 N. E. 1.

§ 242. **A party cannot complain of the allowance of a challenge, provided he obtains an impartial jury.** The right of a suitor is to reject an undesirable juror, not to have a particular juror whom he desires. Therefore no constitutional right of a defendant is infringed by increasing the number of peremptory challenges allowed the prosecution; the defendant's power of securing partiality in the jurors is not thereby infringed. The legislature has entire control over the allowance and the number of peremptory challenges.[1] It follows that neither party can complain that a challenge is allowed; if it is wrongly allowed, the power of the other party to have an impartial jury is not thereby impaired in the least, and his legal right is not infringed.[2] For the same reason, the wrongful overruling of a challenge for cause will not necessarily give the party the right to a new trial. If the peremptory challenges are not exhausted, the party whose challenge for cause is overruled may challenge peremptorily, and thus keep the obnoxious juryman off the panel. There can be no detriment to the party, therefore, until after the exhaustion of his peremptory challenges. If it can be shown that he would not otherwise have used the challenge by which he excluded, or might have excluded, the obnoxious juror, it is made evident that he was not harmed by the overruling of his challenge; and this plainly appears if he did not finally exhaust the number allowed him. The rule is, therefore,

[1] Hayes *v.* Missouri, 120 U. S. 68.

[2] S. *v.* Sortor, 52 Kan. 581, 34 Pac. 1036; S. *v.* Kluseman, 53 Minn. 541, 55 N. W. 741. *Contra*, P. *v.* McQuade, 110 N. Y. 284, 18 N. E. 156 (statutory).

that the overruling of a challenge for cause cannot be ground for a new trial if the party does not finally exhaust the number of his peremptory challenges.[1]

§ 243. **The court may, in its discretion, before evidence is introduced, excuse a juror, and fill his place with another**; and the defendant cannot object if he is not thereby prejudiced.[2] This discretion has been properly exercised where a juror who had been accepted did not promptly appear after an adjournment;[3] or was discovered to be incompetent,[4] or became ill.[5] So the court may in its discretion allow a peremptory challenge after a juror is sworn, but before the panel is completed.[6] But it has been held too late to allow such a challenge after the panel was completed and the full jury sworn;[7] yet, the trial not having begun, the defendant was not yet in jeopardy, and there could therefore have been no objection to the challenge on that ground.

§ 244. **If in the course of the trial a juror becomes unable to sit, as by reason of illness or death, or is discovered to be incompetent, the trial must begin again.** This does not involve an illegal second jeopardy.[8] It is in the discretion of the court to add another juror to the

[1] P. *v.* Durrant, 116 Cal. 179, 48 Pac. 75; Shields *v.* S., 149 Ind. 395, 49 N. E. 351; P. *v.* Fowler, 104 Mich. 449, 62 N. W. 572; P. *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616.

[2] P. *v.* Damon, 13 Wend. 351.

[3] S. *v.* La Croix, 8 S. D. 369, 66 N. W. 944.

[4] P. *v.* Barker, 60 Mich. 277, 27 N. W. 539.

[5] Ozburn *v.* S., 87 Ga. 173, 13 S. E. 247.

[6] P. *v.* Durrant, 116 Cal. 179, 48 Pac. 75. See P. *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105.

[7] P. *v.* Dolan, 51 Mich. 610.

[8] *Ante*, § 81.

existing panel to fill the number, or to empanel a new jury.[1] If the former course is taken, however, the jury thus newly filled is really a new jury. The new juryman, and it would seem any of the old jurymen, may be challenged for cause,[2] and the new juryman, at least, may be challenged peremptorily, though the defendant's challenges were exhausted at the empanelling of the original jury.[3]

§ 245. **An objection to a juror must be presented in the form of a challenge, and not by an objection at a later stage of the trial.** Any irregularity or disqualification is effectually waived by the defendant accepting the juror or the panel; and if he so accepts, he cannot afterward object.[4] There is no constitutional impediment to such a waiver.[5]

If the incompetence of a juror is discovered for the first time after verdict, it is generally held that even if the defendant was ignorant of the incompetence and was not to blame for his ignorance, he cannot have a new trial because of the juror's incompetence, unless he can show that he was prejudiced by the service of the juror, as, for instance, by showing that he was actually harmed and that he would have challenged if he had known.[6]

[1] Cal. Pen. Code, § 1123; P. *v.* Van Horn, 119 Cal. 323, 51 Pac. 538.

[2] S. *v.* Vaughan, 23 Nev. 103, 43 Pac. 193.

[3] P. *v.* Stewart, 64 Cal. 60, 28 Pac. 112.

[4] Kirkham *v.* P., 170 Ill. 9, 48 N. E. 465; Murphey *v.* S., 43 Neb. 34, 61 N. W. 491; Flynn *v.* S., 97 Wis. 44, 72 N. W. 373.

[5] Kohl *v.* Lehlback, 160 U. S. 293.

[6] P. *v.* Sanford, 43 Cal. 29; Mackin *v.* P., 115 Ill. 312, 3 N. E. 222; C. *v.* Parsons, 139 Mass. 381, 31 N. E. 767; Leeper *v.* S., 29 Tex. App. 63, 14 S. W. 398. But see Hill *v.* P., 16 Mich. 351; McGill *v.* S., 34 Oh. S. 228.

FUNCTION OF JURY.

§ 246. The jury are judges of the fact only, questions of law being for the court. Events which preceded the American Revolution gave currency to the idea that the jury were, or should be, judges of the law in criminal cases. Especially in prosecutions for libel growing out of political controversies it was thought that the whole case should lie in the hands of the jury, who represented the people, rather than in those of the judges, who represented the existing government. The contention that the jury should judge the law, as well as the facts, thus came to be regarded as a tenet of the more liberal party; and this notion was reflected in the Constitutions of some States,[1] and it was held in Massachusetts as common law that the jurors are judges of the law.[2] The notion receives some plausibility from the fact that if the jury, ignoring the law as stated by the court, chooses to find a general verdict of *not guilty*, the case is at an end; the defendant cannot be tried again, since he has been once in jeopardy.

Even in States where the jury are said to judge the law, however, it is their legal duty to find the law as the court states it; since to ignore the charge of the court would be to find a verdict directly in the teeth of the only evidence of the law before them. It is error to find the law otherwise than as the court states it,[3] and a conviction thus found would be set

[1] Such as Illinois and Indiana. Parker *v.* S., 136 Ind. 284, 35 N. E. 1105.

[2] C. *v.* Anthes, 5 Gray 185.

[3] Mullinix *v.* P., 76 Ill. 211; Dean *v.* S., 147 Ind. 215, 46 N. E. 528; C. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228.

aside; so the jury cannot act on evidence rejected by the court as incompetent, nor refuse to consider as incompetent evidence admitted by the court.[1]

In most jurisdictions it is rightly held that the functions of court and jury are the same in criminal as in civil cases; and that the jury have no right to judge the law.[2]

[1] C. *v.* Knapp, 10 Pick. 477.

[2] Sparf *v.* U. S., 156 U. S. 51; Roesel *v.* S. (N. J. L.), 41 Atl. 408; S. *v.* Burpee, 65 Vt. 1, 25 Atl. 964; Thayer, Prelim. Treat. Evid. 253.

CHAPTER XXVI.

THE JURY DURING THE TRIAL.

§ 247. **The jury must be sworn, and the fact that they were sworn, and the form of the oath, must appear on the record.**[1] This requirement cannot be waived by the defendant, since an unsworn body cannot be a jury.[2] If, however, an oath is administered, and is substantially correct in form, a mere irregularity which does not prejudice the defendant is not sufficient ground for a new trial.[3]

§ 248. **After having been sworn, the jury should remain in the custody of an officer, and should not separate without leave.** It is usually held, however, that when part of the jurors have been sworn, the panel not being complete, and even after the entire jury is sworn, no evidence yet having been given, the court may in its discretion allow the jury to separate.[4] In a case not capital (in England only in a prosecution for misdemeanor[5]) the court may permit the jury to separate at any time before the case has been given to the jury,[6]

[1] Barney *v.* P., 22 Ill. 160. See Baldwin *v.* Kansas, 129 U. S. 52.

[2] Slaughter *v.* S., 100 Ga. 323, 28 S. E. 159.

[3] Lancaster *v.* S., 91 Tenn. 267, 18 S. W. 777.

[4] S. *v.* Todd, 146 Mo. 295, 47 S. W. 923; S. *v.* Voorhies, 12 Wash. 53, 40 Pac. 620.

[5] R. *v.* Kinnear, 2 B. & Ald. 462.

[6] P. *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049; Sutton *v.* P., 145 Ill. 279, 34 N. E. 420.

provided the defendant is not prejudiced thereby. If, however, such a separation prejudices the defendant it is fatally erroneous; as where the jurors during a trial were allowed to go to their homes for two months, and a strong feeling against the defendant existed in the county.[1] It is always proper for the court to forbid any separation, and order the jury to be kept together.[2] And in some States a separation, even by leave of court, is forbidden under any circumstances, without the defendant's consent;[3] while even separation by consent of the defendant himself is in some States forbidden or regulated by statute.[4]

If a wrongful separation of the jury has taken place, it is *prima facie* cause for a new trial, in case the defendant is convicted; but according to the weight of authority, at least in a prosecution for a non-capital offence, a new trial will not be granted if it is shown that no prejudice to the defendant was caused or could have been caused by the separation. The burden is on the prosecution to show that no prejudice could have occurred to the defendant because of the separation;[5] but if this is shown, the verdict will not be disturbed.[6] This rule seems to

[1] P. *v.* Dinsmore, 102 Cal. 381, 36 Pac. 661.

[2] P. *v.* Considine, 105 Mich. 149, 63 N. W. 196.

[3] S. *v.* Smith, 102 Ia. 656, 72 N. W. 279; S. *v.* Place, 5 Wash. 773, 32 Pac. 736.

[4] McCampbell *v.* S., 37 Tex. Cr. R. 607, 40 S. W. 496; S. *v.* Rogan, 18 Wash. 43, 50 Pac. 582.

[5] P. *v.* Douglass, 4 Cow. 26; Moss *v.* C., 107 Pa. 267.

[6] Cooper *v.* S., 120 Ind. 377, 22 N. E. 320; S. *v.* Cucuel, 31 N. J. L. 249; C. *v.* Manfredi, 162 Pa. 144, 29 Atl. 404; S. *v.* Lawrence (Vt.), 41 Atl. 1027; Crockett *v.* S., 52 Wis. 211, 8 N. W. 603.

be followed equally whether the separation took place before or after the jury retired to consider the verdict.[1] The courts are naturally more strict in prosecutions for capital crimes; and there are authorities which seem to hold that in such cases any wrongful separation will be cause for a new trial, whether prejudicial or not.[2] But even in such a case if the possibility of influence could be eliminated, as by showing that during separation the juror saw or communicated with no one, any court, in spite of the *dicta* referred to, would probably refuse a new trial.[3]

The finding of the trial court on the question of prejudice will not be disturbed, unless clearly wrong.[4] The appellate court has upheld a verdict where a juror was taken by an officer to consult a physician,[5] and where a juror who had become ill was taken into a separate room, the deliberations of the jury being meanwhile suspended;[6] where he was allowed, under the direction of an officer, to go to a retiring-room,[7] and to get his mail at the post office.[8] On the other hand, it is held to vitiate a

[1] C. *v.* Heden, 162 Mass. 521, 39 N. E. 181; S. *v.* Church, 6 S. D. 89, 60 N. W. 143. *Contra*, by statute, P. *v.* Hawley, 111 Cal. 78, 43 Pac. 404.

[2] S. *v.* Foster, 45 La. Ann. 1176, 14 So. 180; S. *v.* Gray, 100 Mo. 523, 13 S. W. 806.

[3] S. *v.* Harrison, 36 W. Va. 729, 15 S. E. 982.

[4] C. *v.* McCauley, 156 Mass. 49, 30 N. E. 76.

[5] P. *v.* Hoch, 150 N. Y. 291, 44 N. E. 976.

[6] Hughes *v.* P., 116 Ill. 330, 6 N. E. 55; P. *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846.

[7] Stout *v.* S., 76 Md. 317, 25 Atl. 299.

[8] Crockett *v.* S., 52 Wis. 211, 8 N. W. 603.

verdict if a juror separates from his fellows to buy liquor.[1]

The officer who has a jury in charge should be sworn; but failure to swear the officer will not vitiate the verdict if it is shown that no prejudice resulted.[2]

§ 249. **Improprieties of conduct on the part of the jury will not vitiate the verdict unless they were such as to affect it.**[3] Thus where they stop to be photographed while passing from one place to another, the verdict will not be set aside.[4] On the other hand, misconduct which affects the verdict is ground for a new trial.[5] Thus, where the jury or some of the jurors agree to determine the verdict by lot, the verdict must be set aside.[6] It seems that if it is doubtful whether the misconduct affected the verdict, a new trial should be granted.[7] The question whether the verdict was thus affected or not should be determined by the trial court.[8]

The reading of newspapers by a juror during the trial is not cause for a new trial, unless the verdict was thereby affected.[9] It is, however, for the suc-

[1] P. *v.* Douglass, 4 Cow. 26; Weis *v.* S., 22 Oh. S. 486. *Contra*, S. *v.* Cucuel, 31 N. J. L. 249.

[2] U. S. *v.* Ball, 163 U. S. 662; S. *v.* Crafton, 89 Ia. 109, 56 N. W. 257; P. *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

[3] Portis *v.* S., 27 Ark. 360; P. *v.* Kramer, 117 Cal. 647, 49 Pac. 842; C. *v.* White, 147 Mass. 76, 16 N. E. 707.

[4] S. *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

[5] P. *v.* Mitchell, 100 Cal. 328, 34 Pac. 698; P. *v.* Hull, 86 Mich. 449, 49 N. W. 288.

[6] Mellish *v.* Arnold, Bunb. 51; White *v.* S., 37 Tex. Cr. R. 651, 40 S. W. 789. See C. *v.* Wright, 1 Cush. 46.

[7] Hutchins *v.* S., 140 Ind. 78, 39 N. E. 243.

[8] C. *v.* White, 148 Mass. 429, 19 N. E. 222.

[9] U. S. *v.* Reid, 12 How. 361; P. *v.* Leary, 105 Cal. 486, 39 Pac. 24; P. *v.* Gaffney, 14 Abb. Pr. N. S. 36.

cessful party to show that the newspaper did not affect the verdict;[1] and if this is not shown, the verdict must be set aside.[2]

§ 250. **Procuring food and drink by a juror is not sufficient ground for setting aside the verdict.** It was the ancient practice to keep the jury without meat, drink, and fire until the verdict was returned. This harshness has long since been abandoned; and, indeed, the direct tendency of it was evidently to disable the jury from giving impartial and wise consideration to the case. The comfort and health of the jurors are now consulted by the court. But necessary food and drink should be furnished to the jurors under direction of the court.

It is not, however, error that should invalidate a verdict if a juror at his own expense buys food while the jury is together;[3] and by the better opinion it is not fatal to a verdict that during the progress of a case a juror procured and drank intoxicating liquor, if he did not become intoxicated and his mental condition was not affected by the liquor.[4]

If, however, the juror drinks so much as to unfit him to discharge his duty while listening to the testimony or deliberating on the verdict, there must be a new trial;[5] and even if he was intoxicated during the recess, and is sober when the court reas-

[1] P. *v.* Stokes, 103 Cal. 193, 37 Pac. 207.

[2] S. *v.* Walton, 92 Ia. 455, 61 N. W. 179.

[3] S. *v.* Beste, 91 Ia. 565, 60 N. W. 112; S. *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

[4] P. *v.* Leary, 105 Cal. 486, 39 Pac. 24; S. *v.* Madigan, 57 Minn. 425, 59 N. W. 490; C. *v.* Cleary, 148 Pa. 26, 23 Atl. 1110.

[5] P. *v.* Gray, 61 Cal. 164.

sembles, it has been held to vitiate the verdict in a capital case.[1] But if the defendant perceives this, and does not call the attention of the court to it, he cannot object.[2]

§ 251. **Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden,** and invalidate the verdict, unless their harmlessness is made to appear;[3] but if shown not to be prejudicial, the verdict will stand in spite of the communication. Thus the presence of an officer in the jury-room during the deliberations of the jurors does not, in the absence of prejudice, invalidate the verdict;[4] and the same is true even if there was actual communication between the officer and a juror.[5] So conversation by a juror with third parties during the trial, but not on subjects connected with the trial, is no ground for setting aside the verdict;[6] and even if the conversation turned on the trial, the verdict will stand if it can be shown that the conversation did not prejudice the defendant.[7] Even conversation between a juror and the prosecutor has been held not sufficient ground for a new trial, in the absence of evidence that it prejudiced the verdict; though the

[1] Brown *v.* S., 137 Ind. 240, 36 N. E. 1108.

[2] P. *v.* Deegan, 88 Cal. 602, 26 Pac. 500.

[3] Mattox *v.* U. S., 146 U. S. 140.

[4] S. *v.* Beste, 91 Ia. 565, 60 N. W. 112; Crockett *v.* S., 52 Wis. 211, 8 N. W. 603.

[5] S. *v.* Barker, 43 Kan. 262, 23 Pac. 575; P. *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

[6] Masterton *v.* S., 144 Ind. 240, 43 N. E. 138 (*semble*).

[7] S. *v.* Allen, 89 Ia. 49, 56 N. W. 261; P. *v.* Constantino, 153 N. Y. 24, 47 N. E. 37.

court stated that the act was inexcusable.[1] Though misconduct of this sort is sufficient ground for impeaching the verdict, yet if the counsel for the defendant saw it and did not at the time object, it is held that the misconduct is waived, and the verdict will stand.[2]

§ 252. **Any attempt by the court to coerce the jury will be sufficient ground for setting aside the verdict.** Thus holding them together an unduly long time in discomfort, urging an agreement,[3] or threatening to keep them together until they agree,[4] urging an agreement by saying that to disagree is "almost to confess incompetency,"[5] or assuring them that in case of conviction they may rely upon the clemency of the court[6] invalidates a verdict. On the other hand, it is not improper for the court to express the hope that they will agree before morning, if they conscientiously can;[7] or to send them back to deliberate further, after they have announced a failure to agree;[8] or to tell them that they should decide the case if they conscientiously could, and should listen to each other's arguments with a disposition to be convinced; and that the minority should ask themselves whether they might not reasonably doubt the correctness of

[1] P. *v.* Dunne, 80 Cal. 34, 21 Pac. 1130. But see Hutchins *v.* S., 140 Ind. 78, 39 N. E. 243.

[2] Waterman *v.* S., 116 Ind. 51, 18 N. E. 63.

[3] P. *v.* Sheldon, 156 N. Y. 268, 50 N. E. 840.

[4] Odette *v.* S., 90 Wis. 258, 62 N. W. 1054 (*semble*).

[5] S. *v.* Bybee, 17 Kan. 462.

[6] McBean *v.* S., 83 Wis. 206, 53 N. W. 497.

[7] C. *v.* Kelley, 165 Mass. 175, 42 N. E. 573.

[8] S. *v.* Garrett, 57 Kan. 132, 45 Pac. 93; Odette *v.* S., 90 Wis. 258, 62 N. W. 1054.

their judgment, since it was not concurred in by the majority.[1]

It is within the discretion of the court to recall the jury to inquire whether they have agreed, and, if necessary, to give them additional instructions.[2] The jury should for this purpose be brought into court; it has been held reversible error for the court to go to the jury.[3]

§ 253. **The jury must not act upon evidence, however acquired, except such as is regularly given in open court.** Thus a juror has no right to inform the other jurors of facts within his own knowledge; if he has such facts, it is his duty to become a witness and state them.[4] And if a juror does communicate private information to his fellows, the verdict must be set aside, unless it was not influenced thereby; the burden of showing that the verdict was not so influenced being upon the party who desires to sustain the verdict.[5]

Where during the trial a juror, by accident or design, discovers out of court something bearing on the case, as, for instance, if he goes to and sees the scene of the crime, it is an impropriety which, however, will not vitiate the verdict unless it prejudiced the defendant.[6]

[1] Allen *v.* U. S., 164 U. S. 492.

[2] Allis *v.* U. S., 155 U. S. 117.

[3] S. *v.* Patterson, 45 Vt. 308; S. *v.* Wroth, 15 Wash. 621, 47 Pac. 106. *Contra*, Priest *v.* S. (Tex. Cr.), 34 S. W. 611.

[4] Richards *v.* S., 36 Neb. 17, 53 N. W. 1027.

[5] S. *v.* Woods, 49 Kan. 237, 30 Pac. 520. In Iowa, however, it has been held that the verdict will not be set aside unless it is proved to have been influenced by the statement. S. *v.* Cross, 95 Ia. 629, 64 N. W. 614.

[6] S. *v.* Beasley, 84 Ia. 83, 50 N. W. 570; Warner *v.* S., 56 N. J. L. 686, 29 Atl. 505; Palmer *v.* S., 65 N. H. 221, 19 Atl. 1003. In Indi-

It is not necessarily fatal error for the jury to hear in the court-room, whether in connection with the prosecution or with other matters, statements, not evidence, that have a bearing on the case. Thus if the jury accidentally hear testimony in another case having a bearing on the defendant's case, it is not necessarily ground for a new trial;[1] so where they hear testimony in proceedings for contempt growing out of the prosecution in which they are taking part.[2] So it is within the discretion of the court to allow the jury to remain in court during the argument of a motion for a nonsuit,[3] or for the exclusion of evidence.[4]

§ 254. **The jury must take with them into the jury-room nothing not allowed them by the court or by the law.** The record may be taken, though it contains the history of a former trial;[5] and the written charge may also be taken, being part of the record.[6] No other documents may be taken, except such as the court in its discretion may allow;[7] and if this discretion is abused, a new trial will be granted.[8] No articles

ana, however, it seems to be held that if the juror deliberately acquires information outside court, a verdict must be set aside. Conrad *v.* S., 144 Ind. 290, 43 N. E. 221. In that particular case the act of the juror in fact prejudiced the verdict.

[1] C. *v.* Doughty, 139 Pa. 383, 21 Atl. 228.

[2] P. *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

[3] P. *v.* Tomlinson, 102 Cal. 19, 36 Pac. 506.

[4] S. *v.* Wood, 53 N. H. 484. In this case the evidence was admitted.

[5] Masterton *v.* S., 144 Ind. 240, 43 N. E. 138; Forbes *v.* C., 90 Va. 550, 19 S. E. 164.

[6] Dixon *v.* S., 13 Fla. 636.

[7] S. *v.* Raymond, 53 N. J. L. 260, 21 Atl. 328.

[8] Dunn *v.* P., 172 Ill. 582, 50 N. E. 137.

introduced in evidence (such as the weapon with which the crime was committed) may be taken.[1]

It is error to allow the jury to take a copy of the Revised Statutes into the jury-room,[2] though judgment will not be reversed for this if it did not prejudice defendant.[3] But where the Constitution makes the jurors judges of the law, it is no error for them to take a copy of the Statutes.[4]

§ 255. **The evidence of jurors, as to the motives and influences which affected their deliberations, is inadmissible** either to impeach or to support the verdict.[5] Therefore no evidence can be received from a juror as to the course of argument and discussion in the jury-room,[6] or as to the misconduct of jurors during the deliberations;[7] nor can a juror impeach the verdict by testifying that he meant to agree to a different verdict from that returned.[8] Where the testimony of a juror cannot be received, his declaration to a third person is equally inadmissible.[9]

A juryman, however, may testify to any facts bearing upon the question of the existence of any extra-

[1] Forehand *v.* S., 51 Ark. 553, 11 S. W. 766; S. *v.* Justus, 11 Or. 178, 8 Pac. 337. *Contra*, S. *v.* Cushing, 14 Wash. 527, 45 Pac. 145.

[2] S. *v.* Patterson, 45 Vt. 308.

[3] P. *v.* Gaffney, 14 Abb. Pr. N. S. 36; Bernhardt *v.* S., 82 Wis. 23, 51 N. W. 1009.

[4] Mulreed *v.* S., 107 Ind. 62, 7 N. E. 884 (*semble*).

[5] P. *v.* Kloss, 115 Cal. 567, 47 Pac. 459; Palmer *v.* P., 138 Ill. 356, 28 N. E. 130; Taylor *v.* C., 90 Va. 109, 17 S. E. 812.

[6] S. *v.* Lauderbeck, 96 Ia. 258, 65 N. W. 158; C. *v.* Meserve, 156 Mass. 61, 30 N. E. 166.

[7] P. *v.* Azoff, 105 Cal. 632, 39 Pac. 59.

[8] S. *v.* McNamara, 100 Mo. 100, 18 S. W. 938.

[9] Palmer *v.* P., 138 Ill. 356, 28 N. E. 130; C. *v.* Meserve, 156 Mass. 61, 30 N. E. 166.

neous influence, although not as to how far that influence operated upon his mind.[1] So he may testify in denial or explanation of acts or declarations outside of the jury-room, where evidence of such acts has been given as ground for a new trial.[2]

[1] S. v. La Grange, 99 Ia. 10, 68 N. W. 557; Woodward v. Leavitt, 107 Mass. 453.

[2] Mattox v. U. S., 146 U. S. 140.

CHAPTER XXVII.

THE CONDUCT OF THE TRIAL.

§ 256. **The presiding judge has the entire control of the formalities of a trial, the prosecuting attorney of the method of presenting the case.** Thus the court has entire discretion in assigning the order in which cases shall be heard.[1] But the prosecuting attorney may present the different parts of his case in such order as he chooses; and where the defendants in a joint indictment are to be tried separately, the prosecuting officer may proceed first against either defendant as he will.[2] The court may fix the time of sitting, and may, if it will, order night sessions;[3] and it may from time to time adjourn the sitting.[4]

It is the duty of the court to keep order in the court-room, and to prevent applause or other disorder that could prejudice a party.[5] Where such an outbreak occurs, if the jury are cautioned against considering it, a new trial will not be granted; as where a woman denounced defendant as the murderer of her daughter, for whose murder he was being tried.[6] But if the

[1] S. *v.* King, 97 Ia. 440, 66 N. W. 735.

[2] Jones *v.* S., 1 Ga. 610; Patterson *v.* P., 46 Barb. 625.

[3] Wartena *v.* S., 105 Ind. 445, 5 N. E. 20; S. *v.* McCann, 16 Wash. 249, 47 Pac. 443.

[4] R. *v.* Stone, 6 T. R. 527.

[5] S. *v.* Cater, 100 Ia. 501, 69 N. W. 880 (*semble*); Manning *v.* S., 37 Tex. Cr. R. 180, 39 S. W. 118.

[6] C. *v.* Gilbert, 165 Mass. 45, 42 N. E. 336.

disorder is allowed to continue, a new trial will be granted.[1]

The court may order the defendant to stand to be identified, as it may direct him where to sit, to remove his hat, etc.[2] So it may decide when requests to charge shall be made,[3] and when exceptions to the charge shall be taken.[4]

It is within the discretion of the court to refuse to allow witnesses to sit near the prisoner,[5] and on the other hand to permit the wife of the murdered man to remain in the court-room during the trial for the murder,[6] or a wife to remain during the trial of her husband for incest.[7]

§ 257. **The defendant has a right to a public trial.** This right, which is given by the common law, is guaranteed by most of our constitutions. What is meant by public trial, as distinguished from a private trial, is no doubt a trial openly before some witnesses, as against the method common in European countries of a secret examination at which the examining officer and the prisoner alone are present. At the same time, it seems clear that a trial cannot be public unless some members of the public merely as such, who have no direct connection with the administration of justice, are allowed free access to the court-room.

The question usually arises in the case of trials of

[1] Manning *v.* S., 37 Tex. Cr. R. 180, 39 S. W. 118.
[2] P. *v.* Gardner, 144 N. Y. 119, 38 N. E. 1003.
[3] S. *v.* Engeman (N. J.), 23 Atl. 676.
[4] S. *v.* Coella, 8 Wash. 512, 36 Pac. 474.
[5] Hoover *v.* S., 48 Neb. 184, 66 N. W. 1117.
[6] S. *v.* Schieler (Ida.), 37 Pac. 272.
[7] S. *v.* McGilvery (Wash.), 55 Pac. 115.

sexual crimes, where, for the sake of decency and out of consideration perhaps for a female witness, the judge desires to clear the room of persons who are there from prurient curiosity. That such persons do not help the defendant in any way, except in the improper way of embarrassing the witnesses, is evident.

The court in such a case often orders the court-room cleared of all persons who have no business there; but in some States this is held to infringe the rights of the defendant. Thus it has been held that the defendant is entitled to a new trial where the judge excluded all except those necessarily in attendance, such as court officers, members of the bar, and witnesses;[1] and even where he excluded all but respectable persons.[2] In other States it is held that such orders of exclusion are proper. As has been well and vigorously said, "A public trial does not necessarily contemplate that every person whose morbid curiosity for indecent details draws him thither shall have that curiosity gratified by being permitted to be present in the court-room to listen to the recital of disgusting facts."[3] Nor is the defendant prejudiced if the public are temporarily excluded; or if, the court-room being barely large enough to hold the witnesses and jurors summoned in the case, the public are not admitted to their exclusion.[4] "Publicity does not absolutely forbid all

[1] P. *v.* Hartman, 103 Cal. 242, 37 Pac. 153; P. *v.* Yeager, 113 Mich. 228, 71 N. W. 491.

[2] P. *v.* Murray, 89 Mich. 276, 50 N. W. 995.

[3] Benedict *v.* P., 23 Col. 126, 46 Pac. 637.

[4] Kugadt *v.* S. (Tex. Cr.), 44 S. W. 989.

temporary shutting of doors, or render incompetent a witness who cannot be heard by the largest audience, or require a court-room of dimensions adequate to the accommodation of all desirous of attending a notorious trial. And the requirement is fairly met if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those whose presence would be of no service to the accused, and who would only be drawn thither by prurient curiosity, are excluded altogether."[1]

The defendant may waive his right to a public trial, and consent to a trial in private.[2]

§ 258. **The various steps in the trial take place in regular order.** After the empanelling of the jury, the case is opened by a statement of the prosecuting attorney. The opening of the case is always the right of the prosecution, even when the defendant pleads a special plea, such as former jeopardy;[3] and the defendant cannot obtain the right to open even by admitting all the facts alleged, and setting up the defence of insanity.[4]

The opening is a statement by the prosecuting attorney of the facts of the case, made in order that the jury may be familiar with the case and so the better understand the testimony. It has been said that the opening should not be omitted, no matter how plain and simple the facts of the case.[5] Counsel

[1] S. *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330, quoting from 1 Bish. Crim. Pro. § 959, and Cooley, Const. Lim. 312.

[2] P. *v.* Tarbox, 115 Cal. 57, 46 Pac. 896.

[3] S. *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

[4] French *v.* S., 93 Wis. 325, 67 N. W. 706.

[5] R. *v.* Gascoine, 7 C. & P. 772.

in opening must state only facts; he cannot argue on the facts.[1]

The exact order of procedure differs in different States. In England and in this country generally, the prosecution, having opened its case, at once presents the evidence in support of it. In some States, however, it appears to be the common practice for the defendant's opening statement to follow that of the prosecution, before the introduction of evidence; though it would probably be within the discretion of the court to allow a different order.[2] According to the regular practice, the evidence for the prosecution having been presented, the defendant may speak. He regularly makes an opening, explaining his case, whether it consists in disproof or in a substantive defence, and then presents his evidence. After the defendant's evidence is in, a chance for evidence in rebuttal is given to the prosecution.

By the English practice, if the defendant chooses not to present evidence he may at once, on the close of the evidence for the prosecution, make a closing argument; and in that case the prosecuting attorney will have no right to reply,[3] unless he is the Attorney-General, who has the right to close even when no evidence is presented by the defence.[4] In this country, unless there is a mutual agreement to submit the case without argument, either party has the right to a closing argument, whether the other chooses to speak or not. In some States the defendant argues

[1] P. *v.* Bezy, 67 Cal. 223.
[2] Cannon *v.* P., 141 Ill. 270, 30 N. E. 1027.
[3] R. *v.* Carlile, 6 C. & P. 636.
[4] See Trial of Adelaide Bartlett.

first, followed by the prosecution; and this is the older and the usual practice. In other States the prosecution argues first, then the defendant, and the prosecution replies. Everywhere the prosecution has the closing argument, as he opens the case. If there are two or more counsel for the prosecution, it rests with the official prosecuting attorney to decide which of them shall close the case.[1]

After the arguments are finished, the court in its "charge" explains the law bearing on the case to the jury. The jury then retire to the jury-room to consider their verdict, unless the case is so clear that they are able to return a verdict at once, without consultation and without leaving their seats.

§ 259. **The order in which evidence shall be introduced rests with the trial court.**[2] Thus the court alone may decide whether to allow other evidence before the *corpus delicti* is proved,[3] or to anticipate a rebuttal by allowing evidence in disproof of a probable defence,[4] or to introduce in rebuttal evidence that should more properly have been introduced in chief.[5] So where the prosecution has rested its case, it is within the discretion of the court to allow it to be reopened and more evidence introduced;[6] and this

[1] S. *v.* Williams (Ida.), 42 Pac. 511.

[2] Thiede *v.* Utah, 159 U. S. 510; Ream *v.* S., 52 Neb. 727, 73 N. W. 227.

[3] P. *v.* Whiteman, 114 Cal. 338, 46 Pac. 99; S. *v.* Davis, 48 Kan. 1, 28 Pac. 1092; Whitney *v.* S., 53 Neb. 287, 73 N. W. 696; S. *v.* Harrison, 66 Vt. 523, 29 Atl. 807.

[4] P. *v.* Van Horn, 119 Cal. 323, 51 Pac. 538.

[5] Turner *v.* U. S., 66 Fed. 280; Simons *v.* P., 150 Ill. 66, 36 N. E. 1019; Murphey *v.* S., 43 Neb. 34, 61 N. W. 491.

[6] C. *v.* Meaney, 151 Mass. 55, 23 N. E. 730; Hans *v.* S., 50 Neb. 150, 69 N. W. 838.

after the defendant's case is closed,[1] and even after the arguments are made,[2] provided a chance is given the other party to meet the new evidence. It is reversible error to deny defendant an opportunity to introduce evidence in rebuttal in such a case.[3] It lies equally within the discretion of the court to deny a reopening, and a new trial will not be granted unless there is an abuse of this discretion.[4]

It is within the discretion of the court to have evidence already given read over.[5] The number of times a question may be repeated on cross-examination is also within the discretion of the court.[6]

§ 260. **At the close of the evidence for the prosecution the defendant may demur to the evidence.**[7] It is usually, however, an unwise course for him to pursue, for if the demurrer is overruled, the defendant cannot introduce evidence; the case is at once submitted to the jury upon the evidence demurred to.[8] "The court will not permit him to 'take two bites at a cherry' by fishing for the opinion of the court, and afterwards introducing testimony, if the demurrer is overruled."[9] The better course, therefore (unless his own evidence may prove the case against him),

[1] P. v. Kindra, 102 Mich. 147, 60 N. W. 458; S. v. Linney, 52 Mo. 40.

[2] Tucker v. P., 122 Ill. 583, 13 N. E. 809; S. v. Burk, 88 Ia. 661, 56 N. W. 180.

[3] P. v. Strait, 154 N. Y. 165, 47 N. E. 1090.

[4] S. v. Bussey, 58 Kan. 679, 50 Pac. 891.

[5] S. v. Burk, 88 Ia. 661, 56 N. W. 180.

[6] Bodee v. S., 57 N. J. L. 140, 30 Atl. 681.

[7] C. v. Parr, 5 W. & S. 345.

[8] Hutchison v. C., 82 Pa. 472; S. v. Adams, 115 N. C. 775, 20 S. E. 722.

[9] S. v. Groves, 119 N. C. 822, 25 S. E. 819.

is, if he has any evidence in his defence, to present it to the jury; and after the whole case is in, it is his right to ask an instruction that there is not sufficient evidence to go to the jury, and that a verdict of not guilty be rendered.[1]

§ 261. **The court may limit the time for argument of counsel** even in prosecutions for felony;[2] but if the discretion is abused by fixing too short a time, a new trial will be granted.[3]

§ 262. **The judge must be on the bench during the entire trial.** He is a component and necessary part of the court, and his absence from the court-room during any part of the trial breaks up the court. It is therefore ordinarily fatal error, for which a new trial will be granted.[4] Where, however, the defendant by his counsel consented to the absence, or where for any reason the absence could not have been prejudicial, the error is not sufficient ground for a new trial.[5] Thus where the absence was during the argument for the defendant only, the defendant could not have been prejudiced; and therefore he cannot ask for a new trial because of it.[6]

[1] *Post*, § 267.

[2] Crawford *v.* S., 112 Ala. 1, 21 So. 214; Dixon *v.* S., 46 Neb. 298, 64 N. W. 961; Thompson *v.* C., 88 Va. 45, 13 S. E. 304.

[3] P. *v.* Green, 99 Cal. 564, 34 Pac. 231; Dille *v.* S., 34 Oh. S. 617; Jones *v.* C., 87 Va. 63, 12 S. E. 226.

[4] P. *v.* Tupper, 122 Cal. 424, 55 Pac. 125; O'Brien *v.* P., 17 Col. 561, 31 Pac. 230; Thompson *v.* P., 144 Ill. 378, 32 N. E. 968. See, however, S. *v.* Seely, 92 Ia. 488, 61 N. W. 184, where the absence of the court caused a dispute as to what had taken place, but was not in itself urged as ground for a new trial.

[5] Turbeville *v.* S., 56 Miss. 793.

[6] Pritchett *v.* S., 92 Ga. 65, 18 S. E. 536; Schintz *v.* P. (Ill.), 52 N. E. 903.

§ 263. **The court in the conduct of the trial must be absolutely impartial between prosecution and defendant.** If the court improperly intimates its opinion, or in any way except legally in the charge influences the verdict, it is error giving a right to a new trial.[1] So language used in the presence of the jury that tends to discredit the defendant or his counsel is improper;[2] and it is reversible error for the judge to state to the jury as true a fact not in evidence.[3]

§ 264. **The court in its charge must inform the jury of the law applicable to the case.** Since the jury alone determine the facts, it is not quite pertinent for the court to express any opinion upon the facts. Under the English practice, however, the judge who presides rehearses to the jury all the facts proved, and freely indicates his opinion as to the truth of the issue; and in an ordinary case the jury find a verdict in accordance with the opinion thus indicated. In some States the court is forbidden to express to the jury an opinion as to the evidence,[4] in others the common law prevails, and the court may express an opinion on the facts in the charge.[5] If not forbidden by statute, the presiding judge may give his opinion as to the credibility of witnesses, and where the defendant himself has testified he may comment upon his position,

[1] Starr *v.* U. S., 153 U. S. 614; P. *v.* Hawley, 111 Cal. 78, 43 Pac. 404; S. *v.* Hawley, 63 Conn. 47, 27 Atl. 417; Dunn *v.* P., 172 Ill. 582, 50 N. E. 137.

[2] P. *v.* Abbott (Cal.), 34 Pac. 500.

[3] S. *v.* Raymond, 53 N. J. L. 260, 21 Atl. 328.

[4] P. *v.* Kindleberger, 100 Cal. 367, 34 Pac. 852; Lefler *v.* S., 122 Ind. 206, 23 N. E. 154; Mass. Pub. Stat. c. 153, § 5.

[5] Simmons *v.* U. S., 142 U. S. 148; Woodruff *v.* U. S., 58 Fed. 766.

and upon the effect of it on the credibility of his testimony.[1]

The judge may in his discretion read to the jury the statute on which the prosecution is based,[2] even though the result incidentally is to inform the jury of the penalty provided;[3] but it is improper expressly to call their attention to the penalty.[4] The judge may also cite to the jury decisions which sustain his interpretation of the statute.[5]

The charge is ordinarily given orally; but by statute in some States it must be reduced to writing. If in such a State any oral instructions are given, it is reversible error.[6]

§ 265. **A party who desires that a certain instruction may be given to the jury must request the court to give it.** The omission of pertinent instructions is not usually error, unless they are requested by counsel;[7] unless the court is required by law to give them, when in some States it is held error to omit the instruction, though not asked by counsel.[8] Refusal upon request to repeat an instruction is not error.[9]

[1] Reagan *v.* U. S., 157 U. S. 301; Hirschman *v.* P., 101 Ill. 568; P. *v.* Calvin, 60 Mich. 113, 26 N. W. 851; S. *v.* Cook, 84 Mo. 40.

[2] C. *v.* Burns, 167 Mass. 374, 45 N. E. 755.

[3] C. *v.* Harris, 168 Pa. 619, 32 Atl. 92.

[4] C. *v.* Switzer, 134 Pa. 383, 19 Atl. 681.

[5] P. *v.* Bowkus, 109 Mich. 360, 67 N. W. 319; P. *v.* Minnaugh, 131 N. Y. 563, 29 N. E. 750.

[6] P. *v.* Sanford, 43 Cal. 29; S. *v.* Huber, 8 Kan. 447.

[7] Humes *v.* U. S., 170 U. S. 210; P. *v.* Ahern, 93 Cal. 518, 29 Pac. 49; Hall *v.* S., 28 Tex. App. 146, 12 S. W. 739.

[8] S. *v.* Myers, 8 Wash. 177, 35 Pac. 580. *Contra*, Grubb *v.* S., 117 Ind. 277, 20 N. E. 257; S. *v.* Stevens, 67 Ia. 557, 25 N. W. 777.

[9] Dixon *v.* S., 13 Fla. 636; Warner *v.* S., 56 N. J. L. 686, 29 Atl. 505.

It is not necessary for the court to give a requested charge in the exact words of the request; so long as the charge as given is correct and sufficient the defendant cannot complain.[1] So it is not proper to give a charge as requested in a form that the jury might not understand, as if it contains words in a foreign language;[2] and it is proper to refuse a charge already substantially given,[3] or irrelevant to the issue.[4]

§ 266. **Though the charge is erroneous, the defendant cannot take advantage of the error unless he objects at the time.** If upon objection to the charge the court at once corrects it, there is no error.[5] Therefore objection must be seasonably made, in order that if the error is mere oversight it may be corrected. If objection is not made at the time, it is waived.[6]

Where there is a general exception to the charge, and it is good in general, the court will not reverse for errors in particular parts,[7] unless the whole charge is erroneous, and therefore must be excepted to as a whole.[8]

Where the meaning of the whole is correct, judgment will not be reversed because of error in detached sentences, if on the whole charge the jury was

[1] C. *v.* Mullen, 150 Mass. 394, 23 N. E. 51; C. *v.* McManus, 143 Pa. 64, 21 Atl. 1018.

[2] S. *v.* Helm, 92 Ia. 540, 61 N. W. 246.

[3] C. *v.* Cosseboom, 155 Mass. 298, 29 N. E. 463.

[4] Hill *v.* C., 88 Va. 633, 14 S. E. 330.

[5] C. *v.* Clifford, 145 Mass. 97, 13 N. E. 345.

[6] S. *v.* Richards, 85 Me. 252, 27 Atl. 122; C. *v.* Daley, 148 Mass. 11, 18 N. E. 579.

[7] S. *v.* Ray, 146 Ind. 500, 45 N. E. 693; C. *v.* Tolman, 149 Mass. 229, 21 N. E. 377. See Brown *v.* U. S., 164 U. S. 221.

[8] Hicks *v.* U. S., 150 U. S. 442.

not misled.[1] But where inconsistent instructions are given, one correct, the other incorrect, there must be a new trial, since it is impossible to know which was followed.[2]

§ 267. **If there is no evidence of the defendant's guilt, the court must direct the jury to bring in a verdict of not guilty.** It is error, in such a case, to allow the jury to find any other verdict.[3] In most jurisdictions a verdict of not guilty may be directed wherever the evidence against the defendant is so slight that the court would set aside a verdict of guilty if one were found.[4] In Massachusetts this course appears to be permitted only when there is not a *scintilla* of evidence against the defendant.[5] If enough evidence is presented to make it necessary for the defendant to enter upon his defence, nothing that appears thereafter in the evidence can require the court to direct a verdict.[6] This matter is regulated by statute in California, where a court cannot direct a verdict; it may only "advise" an acquittal.[7]

§ 268. **In some jurisdictions it is held that if the facts are undisputed and show the defendant to be guilty, the court may direct the jury to find a verdict of guilty.**[8] In

[1] P. *v.* McCallam, 103 N. Y. 587, 9 N. E. 502; C. *v.* Zappe, 153 Pa. 498, 26 Atl. 16.

[2] Mills *v.* U. S., 164 U. S. 644; Beck *v.* S., 51 Neb. 106, 70 N. W. 498.

[3] S. *v.* Kyne, 86 Ia. 616, 53 N. W. 420; C. *v.* Merrill, 14 Gray 415.

[4] S. *v.* Cady, 82 Me. 426, 19 Atl. 908 (*semble*); P. *v.* Ledwon, 153 N. Y. 10, 46 N. E. 1046.

[5] C. *v.* Hollis, 170 Mass. 433, 49 N. E. 632.

[6] S. *v.* Jones, 18 Or. 256, 22 Pac. 840.

[7] P. *v.* Daniels, 105 Cal. 262, 38 Pac. 720.

[8] U. S. *v.* Anthony, 11 Blatch. 200; P. *v.* Neumann, 85 Mich. 98, 48 N. W. 290.

such a case it is admitted that the jury may disregard the direction of the court, and it is error to direct the entering of the verdict without referring it to the jury.[1] In other jurisdictions it is held that the question must be left to the jury, and that it is error to direct a verdict of guilty.[2]

[1] P. *v.* Collison, 85 Mich. 105, 48 N. W. 292.
[2] U. S. *v.* Taylor, 11 Fed. 470; S. *v.* Jackson (Kan.), 22 Pac. 427.

CHAPTER XXVIII.

WITNESSES.

§ 269. **The right to meet adverse witnesses face to face** is secured to a defendant by the Constitution of the United States.[1] This article applies only to prosecutions in the federal courts.[2] In the constitutions of most of the States, however, are similar provisions. This constitutional requirement, being for the defendant's benefit, may be waived by him.[3]

The reading of a deposition taken in defendant's presence in a preliminary hearing, where he had an opportunity to cross-examine the witness, if the witness cannot now be found, is not a denial of the right;[4] but the introduction of such testimony is unconstitutional if at the former hearing the defendant could not meet the witnesses.[5] Indeed, in some cases it is held that testimony at a former trial, where, of course, defendant was at liberty to cross-examine, cannot constitutionally be admitted.[6]

[1] Amend. Art. VI.

[2] Ryan *v.* P., 21 Col. 119, 40 Pac. 775; P. *v.* Fish, 125 N. Y. 136, 26 N. E. 319.

[3] S. *v.* Bowker, 26 Or. 309, 38 Pac. 124; Williams *v.* S., 61 Wis. 281, 21 N. W. 56.

[4] P. *v.* Fish, 125 N. Y. 136, 26 N. E. 319 (*semble*); C. *v.* Cleary, 148 Pa. 26, 23 Atl. 1110; S. *v.* Bowker, 26 Or. 309, 38 Pac. 124.

[5] Pooler *v.* S., 97 Wis. 627, 73 N. W. 336.

[6] S. *v.* Foulk, 57 Kan. 255, 45 Pac. 603.

The constitutional provision is not violated by an admission (to prevent a continuance) that absent witnesses would testify in a certain way;[1] nor by reading to the jury the testimony just taken down by short-hand.[2]

§ 270. **In some cases a list of witnesses must be furnished to the defendant.** Thus a party indicted for a capital offence is entitled, as a matter of right, to a list of the witnesses examined in his case before the grand jury;[3] and this right exists in several States in case of an indictment for any offence. This right, however, is waived if there is no seasonable demand for it, nor objection for failure to furnish it.[4] The commonest way of furnishing this list of witnesses is by endorsing it upon the indictment. The accused can claim only the names of the witnesses, not the minutes of their evidence.[5]

At common law, and under the present practice in many jurisdictions, it is not necessary thus to furnish the names of all witnesses intended to be called; and witnesses not examined before the grand jury may be called at will by the prosecution, whether or not their names are on the list furnished.[6]

By a common form of statutory practice, a list of all witnesses to be called at the trial must be furnished to the defendant. This includes the witnesses

[1] Hoyt *v.* P., 140 Ill. 588, 30 N. E. 315.

[2] Jameson *v.* S., 25 Neb. 185, 41 N. W. 138.

[3] C. *v.* Locke, 14 Pick. 485.

[4] Hickory *v.* U. S., 150 U. S. 303; Kelly *v.* P., 132 Ill. 363, 24 N. E. 56; P. *v.* Shea, 147 N. Y. 78, 41 N. E. 505.

[5] Cannon *v.* P., 141 Ill. 270, 30 N. E. 1027.

[6] Thiede *v.* Utah, 159 U. S. 510; Gore *v.* P., 162 Ill. 259, 44 N E. 500.

to the facts to be proved in establishing the case for the prosecution, not witnesses to be used in rebuttal.[1]

In Iowa the list of witnesses must be accompanied by a statement of what each witness is expected to prove. There must be a particular statement; it is not enough to give notice that the prosecution expects to prove by the witness that the defendant committed the offence.[2] The prosecution, however, is not confined in its examination to the particulars named in the notice, but may also elicit other testimony from the witness.[3]

The names of the witnesses are usually indorsed upon the information or indictment, so far as they are known at the time of filing. If witnesses are discovered after the filing of the indictment, it is proper to permit their names to be endorsed upon it afterwards, even after the trial has begun; a continuance being granted, if necessary to protect the defendant from surprise.[4] A mistake in the name of a witness may be corrected upon the same terms as soon as it is discovered.[5]

By the practice of some States it is not necessary to add the names of after-discovered witnesses to those upon the indictment; a witness whose name is not upon the indictment may testify, if his testimony was not known to the defendant at the time of filing the

[1] Goldsby *v.* U. S., 160 U. S. 70; Kelly *v.* S., 51 Neb. 572, 71 N. W. 299.

[2] S. *v.* Kreder, 86 Ia. 25, 52 N. W. 658.

[3] S. *v.* Craig, 78 Ia. 637, 43 N. W. 462.

[4] P. *v.* Baker, 112 Mich. 211, 70 N. W. 431; Johnson *v.* S., 34 Neb. 257, 51 N. W. 835; S. *v.* Kelly, 14 Wash. 702, 45 Pac. 38.

[5] Binkley *v.* S., 34 Neb. 757, 52 N. W. 708.

indictment,[1] or if the defendant had actual notice that his testimony was to be used, and was, therefore, not prejudiced by the omission of the name.[2] If the name was known at the time of filing, and was wilfully omitted, the witness cannot be called.[3]

In South Dakota, though there is no statute requiring notice of witnesses, the court in its discretion may and should reject the evidence of a witness known to the prosecution at the filing of the information, where knowledge of the witness was concealed from the defendant to his prejudice.[4]

§ 271. **The prosecution may call such competent witnesses as it pleases**; it is under no obligation to call or account for every known material witness.[5] Even if the name of a certain person is upon a list of witnesses furnished to the defendant, the defendant cannot demand that the prosecution produce him for examination.[6] It has been held, however, in some jurisdictions that it is within the discretion of the court to require or not to require the calling of all witnesses,[7] or even that the defendant may of right compel it.[8] In such States it is enough if they are

[1] S. *v.* Black, 15 Mont. 143, 38 Pac. 674; S. *v.* King, 9 S. D. 628, 70 N. W. 1046.

[2] Askew *v.* P., 23 Col. 446, 48 Pac. 524; S. *v.* Kent, 5 N. D. 516, 67 N. W. 1052.

[3] Logan *v.* U. S., 144 U. S. 263; P. *v.* Hall, 48 Mich. 482, 12 N. W. 665. But see S. *v.* Beal, 94 Ia. 39, 62 N. W. 657.

[4] S. *v.* Reddington, 7 S. D. 368, 64 N. W. 170.

[5] Keller *v.* S., 123 Ind. 110, 23 N. E. 1138; C. *v.* Haskell, 140 Mass. 128, 2 N. E. 773; S. *v.* McGahey, 3 N. D. 293, 55 N. W. 753.

[6] Bressler *v.* P., 117 Ill. 422, 3 N. E. 521, 8 N. E. 62.

[7] S. *v.* Payne, 10 Wash. 545, 39 Pac. 157.

[8] Thomas *v.* P., 39 Mich. 309. See R. *v.* Holden, 8 C. & P. 606.

produced and tendered for cross-examination;[1] and if the witness is beyond the jurisdiction of the court and his absence immaterial, there is no error.[2]

§ 272. **It is within the discretion of the court to exclude the witnesses from the court-room during the trial, or to let them stay,**[3] though the request of the defendant for exclusion should almost always be granted.[4] If a witness, disobeying an order of exclusion, stays in the court-room and hears the testimony of other witnesses, it is within the discretion of the court to permit him to testify.[5] It has been held to be within the discretion of the court to exclude such a witness if the party calling him was at all in fault for his remaining in court;[6] but this would hardly be true in a capital case.[7] And if the testimony of the witness is material, and the party not to blame for his disobedience, it is error to exclude his testimony.[8]

§ 273. **At common law a defendant cannot testify in his own behalf,** being an interested party. Where, however, two are jointly indicted but separately tried,

[1] P. *v.* Pope, 108 Mich. 361, 66 N. W. 213.

[2] P. *v.* Berry, 107 Mich. 256, 65 N. W. 98.

[3] McGuff *v.* S., 88 Ala. 147, 7 So. 35; Kelly *v.* P., 17 Col. 130, 29 Pac. 805; S. *v.* Davis, 48 Kan. 1, 28 Pac. 1092; Zoldoske *v.* S., 82 Wis. 580, 52 N. W. 778.

[4] P. *v.* McCarty, 117 Cal. 65, 48 Pac. 984; P. *v.* Considine, 105 Mich. 149, 63 N. W. 196; Murphey *v.* S., 43 Neb. 34, 61 N. W. 491; S. *v.* Morgan, 35 W. Va. 260, 13 S. E. 385.

[5] Holder *v.* U. S., 150 U. S. 91; Bow *v.* P., 160 Ill. 438, 43 N. E. 593; P. *v.* Piper, 112 Mich. 644, 71 N. W. 174.

[6] C. *v.* Crowley, 168 Mass. 121, 46 N. E. 415; S. *v.* Gesell, 124 Mo. 531, 27 S. W. 1101.

[7] Parker *v.* S., 67 Md. 329, 10 Atl. 219 (*semble*).

[8] Taylor *v.* S., 130 Ind. 66, 29 N. E. 415; Parker *v.* S., 67 Md. 329, 10 Atl. 219; S. *v.* Lee Doon, 7 Wash. 308, 34 Pac. 1103.

one may testify either against[1] or for[2] the other. If, however, both are tried together, one cannot testify for the other.[3]

It is now everywhere provided by statute in this country that a defendant may testify on oath in his own behalf; though it is also provided that if he does not choose to avail himself of this right, failure to do so shall not be taken against him. When the defendant (as permitted by statute) takes the stand on his own behalf, he may be cross-examined like any other witness, either on the facts of the case or on matters affecting his credibility.[4]

§ 274. **Witnesses may be compelled to recognize for their appearance before the grand jury or at the trial,** and in default of sufficient surety may be held in jail.[5] Witnesses for the defence as well as for the prosecution may be compelled to recognize.[6]

[1] Winsor *v.* R., L. R. 1 Q. B. 390; Benson *v.* U. S., 146 U. S. 325; S. *v.* Barrows, 76 Me. 401.

[2] R. *v.* Payne, L. R. 1 C. C. 349 (*semble*); S. *v.* Brien, 32 N. J. L. 414 (*semble*). *Contra*, U. S. *v.* Reid, 12 How. 361.

[3] R. *v.* Payne, L. R. 1 C. C. 349.

[4] Keyes *v.* S., 122 Ind. 527, 23 N. E. 1097; C. *v.* Sullivan, 156 Mass. 315, 23 N. E. 47; P. *v.* Tice, 131 N. Y. 651, 30 N. E. 494.

[5] 2 Hawk. P. C. c. 16, § 2.

[6] S. *v.* Zellers, 2 Halst. 220.

CHAPTER XXIX.

EVIDENCE.

§ 275. In such a treatise as the present, an elaborate consideration of the law of evidence, or even of such parts of that law as are frequently involved in criminal trials, would be out of place. There are, however, a few rules of evidence which have peculiar reference to trials for crime; and a brief consideration of such rules may not be improper.

All essential allegations may be supported by evidence; thus in most crimes intent may be proved, as well as act. All incriminating circumstances may be shown by competent evidence. It is thus proper to prove motive, opportunity, and behavior of the defendant before and after the offence. Evidence of an attempt to escape, or to conceal one's self to avoid arrest, is admissible, and should be given such weight as it deserves.[1] It has been held both that such evidence does[2] and that it does not[3] create a presumption of guilt.

Evidence of the possession of recently stolen property, if uncontradicted, will warrant a conviction for

[1] C. *v.* Brigham, 147 Mass. 414, 18 N. E. 167; C. *v.* McMahon, 145 Pa. 413, 22 Atl. 971.

[2] S. *v.* Adler, 146 Mo. 18, 47 S. W. 794.

[3] Hickory *v.* U. S., 160 U. S. 408.

a crime which includes larceny; it makes a *prima facie* case, if there is no evidence raising a doubt of guilt.[1] So evidence of possession by defendant, soon after the death of the victim, of property which was in possession of the murdered person is *prima facie* evidence of guilt, and will justify conviction if not explained.[2] It has been said that such evidence, though admissible, does not create a presumption against defendant, and without other evidence will not justify conviction.[3]

A photograph may be introduced for the purpose of showing that at its date the person wore whiskers,[4] or to establish the identity of defendant with a person formerly convicted,[5] or that deceased was of weak physique.[6] So a photograph of the premises where the murder took place may be shown.[7] Even a drawing of premises where the murder took place may be admitted, where the artist swears to its accuracy.[8]

Clothing worn by the deceased when he was shot may be produced in evidence before the jury.[9] And in a prosecution for assault and battery the wounds of the injured party may be shown to the jury.[10]

[1] Keating *v.* P., 160 Ill. 480, 43 N. E. 724; C. *v.* Randall, 119 Mass. 107.

[2] Wilson *v.* U. S., 162 U. S. 613.

[3] Stuart *v.* P., 42 Mich. 255, 3 N. W. 863; Ingalls *v.* S., 48 Wis. 647, 4 N. W. 785.

[4] C. *v.* Morgan, 159 Mass. 375, 34 N. E. 458.

[5] P. *v.* Smith, 121 N. Y. 578, 24 N. E. 852.

[6] P. *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

[7] P. *v.* Pastolka, 149 N. Y. 570, 43 N. E. 548.

[8] P. *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

[9] Levy *v.* S., 28 Tex. App. 203, 12 S. W. 596.

[10] P. *v.* Sutherland, 104 Mich. 468, 62 N. W. 566.

§ 276. **Where evidence is erroneously admitted, but the court before the charge orders it stricken out and tells the jury to disregard it, the error is cured,** at least in absence of evidence of prejudice.[1] And clearly if evidence is at first wrongly excluded, but is afterwards admitted, there is no error.[2] But it has been held that the exclusion of proper questions to the prosecuting witness on cross-examination, intended to test the truth of her story, is not cured by offering her for cross-examination on those points later, since she might meanwhile have prepared herself.[3]

§ 277. **In the trial of a prosecution for homicide, the dying declarations of the person killed are admissible, either for or against the defendant, to explain the circumstances of the killing.** It is supposed that when one knows that his death is approaching, all motives to falsehood are silenced, and the mind is induced as effectually by the solemn situation to speak the truth as it could be by the administration of an oath.[4] The declarant must be capable of testifying in court; the declarations of a child too young to testify cannot be admitted,[5] nor, while the common-law rule which makes a felon incompetent prevails, can the declaration of a convicted felon just before his execution.[6]

The declarant must be absolutely without hope of

[1] Madden *v.* S., 148 Ind. 183, 47 N. E. 220 · C. *v.* Ham, 150 Mass. 122, 22 N. E. 704.

[2] Lillard *v.* S. (Ind.), 50 N. E. 383.

[3] S. *v.* Hollenbeck, 67 Vt. 34, 30 Atl. 696. But see *contra*, Bow *v.* P., 160 Ill. 438, 43 N. E. 593.

[4] R. *v.* Woodcock, 1 Leach C. C. 500.

[5] R. *v.* Pike, 3 C. & P. 598.

[6] R. *v.* Drummond, 1 Leach C. C. 337.

recovery. If hope was not absolutely extinct the declaration is inadmissible, though the declarant died within an hour of making it.[1] On the other hand, if hope of recovery was extinct, and the declarant expected immediate death, the declaration is admissible, though he in fact lived several days after making it.[2] Whether hope was extinct is a question of fact, to be decided in view of all the evidence; but, being a question incidental to the admission of evidence, it is to be decided by the court.[3]

Dying declarations may be contradicted or discredited like other evidence. Thus the untruthful or irreligious character of the defendant may be shown,[4] that he was in the habit of mistaking persons,[5] or that he made contradictory declarations.[6]

Dying declarations are receivable only where the death of the declarant is the subject of the charge; and such parts of them only may be shown as explain the circumstances of the killing itself.[7] They may be by signs as well as by words.[8]

Such declarations are to be received with caution; and the jury should weigh them with care. Not only were they made without cross-examination, and reported in court as hearsay; the fact that the declar-

[1] R. *v.* Jenkins, L. R. 1 C. C. 187; R. *v.* Bedingfield, 14 Cox C. C. 341; C. *v.* Roberts, 108 Mass. 296.

[2] C. *v.* Cooper, 5 All. 495.

[3] R. *v.* John, 1 East P. C. 357; S. *v.* Elliott, 45 Ia. 486; C. *v.* Cooper, 5 All. 495.

[4] S. *v.* Elliott, 45 Ia. 486; Donnelly *v.* S., 2 Dutch. 464.

[5] C. *v.* Cooper, 5 All. 495.

[6] Carver *v.* U. S., 164 U. S. 694.

[7] R. *v.* Mead, 2 B. & C. 605; North *v.* P., 139 Ill. 81, 28 N. E. 966.

[8] C. *v.* Casey, 11 Cush. 417.

ant is at the point of death, while it may show him without motive to deceive, shows also that his mental powers may be so impaired by the injury as to make a mistake not impossible.[1]

§ 278. **Evidence of fresh complaint made by the woman is receivable in prosecutions for rape**; not to prove the facts, but to corroborate her evidence by showing that she has complained of the occurrence from the beginning.[2] Consequently it cannot be received where the woman does not herself testify.[3] By the more common and better practice only the fact of complaint can be given, not the details of it, at least by the prosecution;[4] though some courts leave a discretion to the presiding judge to admit details.[5] If, however, the defendant on cross-examination institutes an inquiry into some particulars of the complaint, the prosecution in any jurisdiction may upon re-examination examine into all particulars.[6]

§ 279. **Evidence of a man's character is admitted only in a few cases.** The defendant may offer evidence of his own good character, to be considered along with the other evidence in deciding whether there is a reasonable doubt of guilt.[7] Its weight is entirely for the jury; it is wrong to instruct the jury that in a

[1] 3 Russ. Cr. 272; Jackson *v.* Kniffen, 2 Johns. 31, 35.

[2] P. *v.* Mayes, 66 Cal. 597; C. *v.* Cleary, 172 Mass. 175, 51 N. E. 746.

[3] R. *v.* Guttridge, 9 C. & P. 471; Thompson *v.* S., 38 Ind. 39.

[4] R. *v.* Megson, 9 C. & P. 420; Parker *v.* S., 67 Md. 329; P. *v.* McGee, 1 Den. 19.

[5] S. *v.* Kinney, 44 Conn. 153; Burt *v.* S., 23 Oh. S. 394.

[6] Barnett *v.* S., 83 Ala. 40.

[7] Edgington *v.* U. S., 164 U. S. 361; P. *v.* Ashe, 44 Cal. 288; S. *v.* Jones, 52 Ia. 150, 2 N. W. 1060; P. *v.* Brooks, 131 N. Y. 321, 30 N. E. 189; S. *v.* Henry, 5 Jones 65.

doubtful case good character is conclusive in favor of the defendant,[1] or that without regarding the other evidence the defendant's good character might of itself raise a reasonable doubt of guilt.[2]

When the defendant introduces evidence of good character the prosecution may show in rebuttal his bad character,[3] even, it has been held, his character after the date of the offence;[4] but specific bad acts cannot be shown.[5] Bad character can be shown by the government only to rebut the evidence of good character introduced by the defendant;[6] and if no evidence of character is presented, the jury cannot presume it to be bad.[7]

It has been suggested that evidence of good character may not be admissible when the crime is merely *malum prohibitum*, involving no moral turpitude.[8]

In some jurisdictions it is held that the evidence must be as to that trait of character only which has relation to the crime in question: if the crime is larceny, as to honesty; if murder, as to peace and quietness;[9] and, since murder by poisoning includes a technical assault, it has been held that on trial for such a murder the defendant's reputation for peace

[1] Shields *v.* S., 149 Ind. 395, 49 N. E. 351.

[2] Spalding *v.* P., 172 Ill. 40, 49 N. E. 993.

[3] R. *v.* Rowton, 10 Cox C. C. 25, L. & C. C. C. 520; C. *v.* Webster, 5 Cush. 295, 324.

[4] C. *v.* Sacket, 22 Pick. 394.

[5] C. *v.* O'Brien, 119 Mass. 342; Patterson *v.* S., 41 Neb. 538, 59 N. W. 917.

[6] P. *v.* Fair, 43 Cal. 137; C. *v.* Hardy, 2 Mass. 303, 318.

[7] P. *v.* Bodine, 1 Den. 281.

[8] C. *v.* Nagle, 157 Mass. 554, 32 N. E. 861.

[9] P. *v.* Fair, 43 Cal. 137; Kahlenbeck *v.* S., 119 Ind. 118, 21 N E. 460.

and quietness might be shown.[1] In most jurisdictions, however, the evidence introduced must be of good character in general, not in any particular trait.[2]

The character of a third person may sometimes be shown, where it tends to prove the issue. So where in a trial for homicide the issue is self-defence or provocation, the quarrelsome and violent character of the deceased may be shown.[3]

Real evidence, as it might be called, of the defendant's character cannot be kept away from the jury, since they see him during the trial. It is no objection to a verdict that the jury was influenced in its opinion by the actions of the defendant during the trial.[4] It is, however, error to *instruct* the jury to take his conduct at the trial into consideration.[5]

§ 280. **Evidence otherwise admissible is not excluded merely because it shows the defendant to have been guilty of another crime than the one under investigation.** To be sure, evidence that defendant had previously committed an independent criminal act, having no tendency to prove directly the commission of the act under investigation, is inadmissible;[6] but such evidence is not otherwise admissible, since it would have no bearing on the offence except by showing

[1] Carr *v.* S., 135 Ind. 1, 34 N. E. 533.

[2] R. *v.* Rowton, 10 Cox C. C. 25, L. & C. C. C. 520; C. *v.* Hardy, 2 Mass. 303, 317.

[3] Smith *v.* U. S., 161 U. S. 85; C. *v.* Barnacle, 134 Mass. 215 (overruling, it seems, C. *v.* Hilliard, 2 Gray 294); Hurd *v.* P., 25 Mich. 405.

[4] S. *v.* Hutchison, 95 Ia. 566, 64 N. W. 610.

[5] Vale *v.* P., 161 Ill. 309, 43 N. E. 1091.

[6] P. *v.* Benoit, 97 Cal. 249, 31 Pac. 1128; Shears *v.* S., 147 Ind. 51, 46 N. E. 331; C. *v.* Jackson, 132 Mass. 16.

that the defendant was bad enough to commit it, and bad character of the defendant, as has been seen, cannot be shown by the prosecution, except in rebuttal, and then not by evidence of specific acts.[1] Evidence, however, which really tends to prove that defendant committed the offence is not inadmissible because it shows him to have committed another crime.[2] The very narrative of the offence may involve the statement of another crime, as where the defendant committed the rape for which he was under trial at a house of ill fame, of which he was keeper.[3] So where at the same time two persons were killed, evidence of the killing of one is admissible in a trial for killing the other;[4] and the same thing is true where two girls were abused at the same time,[5] and where several goods were stolen at the same time.[6] So proof of the other crime may be a necessary item in the proof of the one under investigation; as where defendant was being tried for forgery, and to prove the forgery the prosecution was allowed to show that he killed the person whose name was forged before the date on which the instrument was made.[7] Such evidence is also received to show identity of person, local proximity, or other facts calculated to connect the respondent with the commission of the offence.[8]

[1] *Ante*, § 279.

[2] Williams *v.* P., 166 Ill. 132, 46 N. E. 749; S. *v.* Burk, 88 Ia. 661, 56 N. W. 180; Walker *v.* C., 1 Leigh 574.

[3] Cross *v.* S., 138 Ind. 254, 37 N. E. 790.

[4] Hickam *v.* P., 137 Ill. 75, 27 N. E. 88; P. *v.* Pallister, 138 N. Y. 601, 33 N. E. 741.

[5] Parkinson *v.* P., 135 Ill. 401, 25 N. E. 764 (*semble*).

[6] R. *v.* Ellis, 6 B. & C. 145, 9 Dow. & R. 174.

[7] P. *v.* Sanders, 114 Cal. 216, 46 Pac. 153.

[8] Halleck *v.* S., 65 Wis. 147, 26 N. W. 572.

So where there was evidence tending to show that the building which the respondent was charged with burning had been fired by means of an ingeniously constructed box, adapted to incendiary purposes only, the prosecution was permitted to show that the respondent had the skill, materials, and tools requisite for the construction of this box, by evidence which tended to prove that he had constructed and made felonious use of another box of the same description.[1]

Evidence of the commission of a former crime is commonly introduced to prove motive,[2] as in a prosecution for wife-murder, evidence of adultery.[3] So in the case of a crime involving a specific intent, evidence of the prior commission of a similar crime may be introduced to prove the intent.[4] Thus, such evidence is admissible to prove the *animus furandi* in prosecutions for larceny or embezzlement;[5] to show intent to defraud, in a prosecution for obtaining by false pretences;[6] to prove guilty knowledge, in prosecutions for uttering a forged check[7] or for receiving stolen property;[8] to prove malice, in a prosecution for arson.[9] So, to disprove the theory that the act complained of was a mere accident, it may be

[1] C. *v.* Choate, 105 Mass. 451.

[2] Moore *v.* U. S., 150 U. S. 57.

[3] P. *v.* Harris, 136 N. Y. 423, 33 N. E. 65.

[4] Crum *v.* S., 148 Ind. 401, 47 N. E. 833; Defrese *v.* S., 3 Heisk. 53.

[5] P. *v.* Cobler, 108 Cal. 538, 41 Pac. 401.

[6] P. *v.* Peckens, 153 N. Y. 576, 47 N. E. 883.

[7] P. *v.* Kemp, 76 Mich. 410, 43 N. W. 439.

[8] S. *v.* Feuerhaken, 96 Ia. 299, 65 N. W. 299; C. *v.* Johnson, 133 Pa. 293, 19 Atl. 402.

[9] P. *v.* Lattimore, 86 Cal. 403, 24 Pac. 1091; S. *v.* Miller, 47 Wis. 530, 3 N. W. 31. But see P. *v.* Fitzgerald, 51 N. Y. 253, 50 N. E. 846.

shown, in a trial for murder by poisoning, that other persons in the defendant's house or within his influence had died of the same poison;[1] and to disprove the theory that an abortion was accidental, evidence of the commission of other abortions by the defendant is admissible.[2] Such evidence must be of former crimes; it is not permissible to show the commission of a crime subsequent to the one under investigation.[3] It is admissible to prove the intent alone, and cannot be referred to in proof of the criminal act;[4] and the jury should be warned by the court to use it for this limited purpose only.[5]

In a trial for a sexual crime (like incest, adultery, or rape) evidence of former acts of intercourse between the same parties is admissible to show the relation between the parties and the defendant's opportunity.[6] Former acts of the defendant with other women cannot be shown for this purpose.[7]

§ 281. **The confession of the defendant, voluntarily made, is admissible against him.**[8] Thus silence while another in presence of the defendant makes incriminating statements may be shown as a confession,[9]

[1] R. *v.* Cotton, 12 Cox C. C. 400; C. *v.* Robinson, 146 Mass. 571, 16 N. E. 452; Zoldoske *v.* S., 82 Wis. 580, 52 N. W. 778.

[2] P. *v.* Seaman, 107 Mich. 348, 65 N. W. 203.

[3] P. *v.* Willard, 92 Cal. 482, 28 Pac. 585.

[4] P. *v.* Thacker, 108 Mich. 652, 66 N. W. 562; S. *v.* Lewis, 19 Or. 478, 24 Pac. 914.

[5] S. *v.* Acheson, 91 Me. 240, 39 Atl. 570.

[6] Lefforge *v.* S., 129 Ind. 551, 29 N. E. 34; P. *v.* Jenness, 5 Mich. 305; C. *v.* Bell, 166 Pa. 405, 31 Atl. 123. This cannot be done, in Illinois, in the case of rape. Parkinson *v.* P., 135 Ill. 401, 25 N. E. 764.

[7] P. *v.* Stewart, 85 Cal. 174, 24 Pac. 722.

[8] P. *v.* Taylor, 93 Mich. 638, 53 N. W. 777.

[9] C. *v.* Funai, 146 Mass. 570, 16 N. E. 458.

unless the defendant was at the time under arrest; for if he was, he cannot be expected to answer prejudicial statements, and his silence is therefore not an admission.[1] Where defendant signed a paper written by another, and to his knowledge purporting to be a confession, it was admissible without evidence that it was read over to him before signing.[2] Yet where the so-called "confession" was the repetition, under the belief in its truth, of information given by the police to the defendant (that he had unwittingly killed a boy), it was not admissible.[3]

A confession of an infant is admissible;[4] so is that of an intoxicated person.[5] The fact of youth or of intoxication goes to the weight, not to the competency, of the evidence. The confession having been admitted, it is for the jury to give it such weight as they think it deserves. They may disbelieve it altogether, or accept it altogether; or they may believe part of a confession and disbelieve the rest.[6]

Confessions obtained by falsehood or artifice are admissible, notwithstanding the fraud;[7] as, for instance, a confession heard by persons concealed.[8] A confession made to free the defendant's sister, then under arrest for the crime, is admissible;[9] so is a

[1] C. *v.* McDermott, 123 Mass. 440; Gardner *v.* S. (Tex. Cr.), 36 S. W. 945.

[2] C. *v.* Coy, 157 Mass. 200, 32 N. E. 4.

[3] P. *v.* McCullough, 81 Mich. 25, 45 N. W. 515.

[4] R. *v.* Reeve, 12 Cox C. C. 179, L. R. 1 C. C. 362.

[5] C. *v.* Howe, 9 Gray 110; S. *v.* Grear, 28 Minn. 426, 10 N. W. 472.

[6] Hauk *v.* S., 148 Ind. 238, 47 N. E. 465; C. *v.* Hunton, 168 Mass. 130, 46 N. E. 404.

[7] Stone *v.* S., 105 Ala. 60, 17 So. 114; S. *v.* Jones, 54 Mo. 478.

[8] C. *v.* Flood, 152 Mass. 529, 25 N. E. 971.

[9] P. *v.* Smalling, 94 Cal. 112, 29 Pac. 421.

confession made to release a father from suspicion.[1] These circumstances go merely to the weight of the evidence.

The confession of one party is not admissible against his co-defendant;[2] but may be admitted as against the one making it, though the crime was a joint one,[3] and even though both are tried together.[4]

§ 282. **The mere fact that defendant is under arrest when he confesses does not render the confession inadmissible,** if there is no threat or inducement by one in authority, and the confession is voluntary.[5] So, though a defendant was under arrest and without counsel, an unsworn statement made by him before a coroner or examining magistrate is admissible as a confession.[6] Where, however, testimony is given on oath before a coroner, examining magistrate, or grand jury, it is usually held to be involuntary, and therefore inadmissible.[7] It is customary in such a situation to caution the witness that he may refuse to answer questions if the answer might be incriminating; and where such a caution is given, it has been held in Illinois that the answer is admissible as a confession;[8]

[1] S. *v.* McKenzie, 144 Mo. 40, 45 S. W. 1117.

[2] P. *v.* Kief, 126 N. Y. 661, 27 N. E. 556; S. *v.* McCullum, 18 Wash. 394, 51 Pac. 1044.

[3] S. *v.* Miller, 81 Ia. 72, 46 N. W. 751; P. *v.* Maunausau, 60 Mich. 15, 26 N. W. 797.

[4] S. *v.* Cram, 67 Vt. 650, 32 Atl. 502.

[5] Sparf *v.* U. S., 156 U. S. 51; Young *v.* C., 8 Bush 366; Roesel *v.* S. (N. J.), 41 Atl. 408.

[6] Wilson *v.* U. S., 162 U. S. 613; C. *v.* Johnson, 162 Pa. 63, 29 Atl. 280. *Contra*, S. *v.* O'Brien, 18 Mont. 1, 43 Pac. 1091.

[7] P. *v.* Gibbons, 43 Cal. 557. *Contra*, C. *v.* Clark, 130 Pa. 641, 18 Atl. 988.

[8] Lyons *v.* P., 137 Ill. 602, 27 N. E. 677.

but in other jurisdictions it is held otherwise, even where a proper caution was given.[1] A voluntary plea of guilty in a lower court is admissible as a confession.[2]

Testimony voluntarily given in a civil proceeding may be proved as an admission; such as testimony before a legislative committee[3] or in an insolvency proceeding.[4]

§ 283. **A confession is inadmissible if made because of threats or inducements held out by persons in authority,** such as the police officer, magistrate, or prosecutor.[5] The threats or inducements must relate to the disposition of the actual case;[6] and notwithstanding threats or promises may have been made, if nevertheless the court is convinced that the confession was not obtained by the influence of hope or fear, but was voluntarily made, it is admissible.[7]

If a person in authority, while speaking of the case, says to the accused, "It will be better for you to confess," the inducement thus held out renders the confession inadmissible;[8] on the other hand, the warning, "What you say may be used for or against you," does not make the confession inadmissible,[9] nor does the remark, "I should like to have you make a clean

[1] S. *v.* Glass, 50 Wis. 218, 6 N. W. 500.

[2] C. *v.* Brown, 150 Mass. 330, 23 N. E. 49.

[3] C. *v.* Hunton, 168 Mass. 130, 46 N. E. 404.

[4] P. *v.* Wieger, 100 Cal. 352, 34 Pac. 826.

[5] Robinson *v.* P., 159 Ill. 115, 42 N. E. 375; P. *v.* Fox, 121 N. Y. 449, 24 N. E. 923. But see S. *v.* Willis (Conn.), 41 Atl. 820.

[6] Roesel *v.* S. (N. J.), 41 Atl. 408.

[7] Bartley *v.* P., 156 Ill. 234, 40 N. E. 831; May *v.* S., 38 Neb. 211, 56 N. W. 804.

[8] R. *v.* Fennell, 7 Q. B. D. 147; Bram *v.* U. S., 168 U. S. 532, and cases cited; P. *v.* Thompson, 84 Cal. 598, 24 Pac. 384.

[9] R. *v.* Baldry, 2 Den. C. C. 430; Roesel *v.* S. (N. J.), 41 Atl. 408.

breast of it."[1] In a recent case the Supreme Court of the United States went to or beyond the bounds of reason and common sense in holding a confession inadmissible because induced by one in authority.[2]

A private detective employed to work up the case is not in authority, so that inducements by him keep out a confession.[3]

It is usually held that if fear or favor has once operated upon the defendant's mind, any statement thereafter made by him to the person thus influencing him is inadmissible, unless there is affirmative proof that the influence has ceased;[4] though it is held in Massachusetts that unless the circumstances afford a reasonable presumption that the former influence continues it will not be considered.[5] Former influence by one official will not render inadmissible a statement made afterwards and quite independently to another official.[6]

§ 284. **It is the function of the court to determine whether a confession is voluntary and otherwise admissible.**[7] The preliminary questions must be investigated and decided. It is error for a court to admit confessions, after objection, without investigating the question of threat or inducement, and without hearing evidence for the defendant.[8] Thus, it is error to

[1] C. *v.* Sego, 125 Mass. 210.

[2] Bram *v.* U. S., 168 U. S. 532. It would hardly be safe to regard this decision as authority.

[3] U. S. *v.* Stone, 8 Fed. 232; Stone *v.* S., 105 Ala. 60, 17 So. 114; Early *v.* C., 86 Va. 921, 11 S. E. 795.

[4] S. *v.* Jones, 54 Mo. 478; Barnes *v.* S., 36 Tex. 356.

[5] C. *v.* Myers, 160 Mass. 530, 36 N. E. 482.

[6] S. *v.* Willis (Conn.), 41 Atl. 820.

[7] S. *v.* Fidment, 35 Ia. 541; Roesel *v.* S. (N. J.), 41 Atl. 408.

[8] Palmer *v.* S., 136 Ind. 393, 36 N. E. 130; Lefevre *v.* S., 50 Oh. S. 584, 35 N. E. 52.

admit the testimony *de bene* to be stricken out if subsequent proof shows that it should not have been admitted.[1] If, however, after investigation the confession is admitted, the jury may be instructed to disregard it, if, on the evidence, they find that it was induced by hope or fear.[2] If the court, after investigation, admits the evidence, an appellate court will not hold the admission of it error unless it was obviously erroneous.[3] Whether the investigation shall take place in presence of the jury is a matter in the discretion of the court.[4]

It has been held that the admission of a confession which was not voluntary is reversible error, though what was said by the defendant did not prejudice his defence.[5] But this decision seems opposed to the general principles of criminal procedure;[6] and the opposite decision has been reached on the same facts.[7]

§ 285. **If as a result of an inadmissible confession other evidence is found, in itself admissible, it may be shown.**[8] The fraud or illegality by means of which the evidence was obtained does not affect the admissibility of the evidence.

[1] P. *v.* Fox, 121 N. Y. 449, 24 N. E. 923.

[2] Wilson *v.* U. S., 162 U. S. 613; C. *v.* Preece, 140 Mass. 276, 5 N. E. 494; P. *v.* Robinson, 86 Mich. 415, 49 N. W. 260; Burdge *v.* S., 53 Oh. S. 512, 42 N. E. 594.

[3] Hauk *v.* S., 148 Ind. 238, 46 N. E. 127; C. *v.* Bond, 170 Mass. 41, 48 N. E. 756.

[4] Shepherd *v.* S., 31 Neb. 389, 47 N. W. 1118; Lefevre *v.* S., 50 Oh. S. 584, 35 N. E. 52.

[5] U. S. *v.* Bram, 168 U. S. 532.

[6] *Post*, § 334.

[7] S. *v.* Coella, 8 Wash. 512, 36 Pac. 474.

[8] Taylor *v.* S., 37 Neb. 788, 56 N. W. 623; S. *v.* Garrett, 71 N. C. 85.

§ 286. There can be no conviction upon the uncorroborated confession of the defendant unless the corpus delicti is established by independent evidence.[1] The independent evidence need not necessarily be conclusive, apart from the confession; it is enough that there is corroborating evidence, apart from the confession, and that on the whole evidence the *corpus delicti* is found.[2] The *corpus delicti* may be proved by circumstantial evidence;[3] and like ordinary questions of fact, the question whether it is sufficiently proved is to be left to the jury.[4]

The "corpus delicti" is the fact of a crime having been committed; not merely that a certain event has happened, like the death of a man or the burning of a house, which might well be investigated, but also that some one is criminally responsible for the result.[5]

§ 287. There is no rule of the common law which forbids conviction on the uncorroberated evidence of an accomplice;[6] though it is proper to instruct the jury

[1] U. S. *v.* Mayfield, 59 Fed. 118; P. *v.* Simonsen, 107 Cal. 345, 40 Pac. 440; S. *v.* German, 54 Mo. 526; Priest *v.* S., 10 Neb. 393, 6 N. W. 468.

[2] U. S. *v.* Williams, 1 Cliff. 5; P. *v.* Jones, 123 Cal. 65, 55 Pac. 698.

[3] C. *v.* Williams, 171 Mass. 461, 50 N. E. 1035; Zoldoske *v.* S., 82 Wis. 580, 52 N. W. 778.

[4] P. *v.* Parmelee, 112 Mich. 291, 70 N. W. 577.

[5] S. *v.* Millmeier, 102 Ia. 692, 72 N. W. 275; Ruloff *v.* P., 18 N. Y. 179. In Texas there is a statutory requirement, in prosecutions for homicide, that some part of the body of the victim should be found. This is incorrectly spoken of as the *corpus delicti*. Kugadt *v.* S. (Tex. Cr.), 44 S. W. 989.

[6] Loehr *v.* P., 132 Ill. 504, 24 N. E. 68; C. *v.* Holmes, 127 Mass. 424; S. *v.* Black, 143 Mo. 166, 44 S. W. 340; Ingalls *v.* S., 48 Wis. 647, 4 N. W. 785.

that such evidence should be accepted with great caution.[1]

In several States there is a statute forbidding a conviction on the uncorroborated testimony of an accomplice.[2] Whether a person is an accomplice and therefore requires corroboration under such a statute is a question of fact for the jury,[3] unless the facts are undisputed, and it turns on a question of law; it is then for the court.[4]

The corroborating evidence need not be sufficient to make out the case, apart from the testimony of the accomplice,[5] nor need the corroboration extend to every material fact,[6] though there must be corroboration in some point that is material.[7] It is enough if there is some evidence from an independent source fairly tending to connect the defendant with the commission of the crime, so that the conviction will not rest entirely upon the evidence of the accomplice.[8]

Any one who takes a voluntary part in the crime, whether as principal or accessory, is an accomplice;[9]

[1] C. *v.* Wilson, 152 Mass. 12, 25 N. E. 16; S. *v.* McCoy, 52 Oh. S. 157, 39 N. E. 316.

[2] P. *v.* Main, 114 Cal. 632, 46 Pac. 612; S. *v.* Moran, 34 Ia. 453; Looman *v.* S., 37 Tex. Cr. R. 276, 39 S. W. 571.

[3] P. *v.* Creegan, 121 Cal. 554, 53 Pac. 1082; Porath *v.* S., 90 Wis. 527, 63 N. W. 1061.

[4] S. *v.* Carr, 28 Or. 389, 42 Pac. 215.

[5] S. *v.* Lawlor, 28 Minn. 216, 9 N. W. 698; S. *v.* Kent, 4 N. D. 577, 62 N. W. 631; S. *v.* Hicks, 6 S. D. 325, 60 N. W. 66.

[6] S. *v.* Hennessy, 55 Ia. 299, 7 N. W. 641; *contra*, S. *v.* Keith, 47 Minn. 559, 50 N. W. 691.

[7] C. *v.* Bosworth, 22 Pick. 397; P. *v.* Plath, 100 N. Y. 590, 3 N. E. 790.

[8] P. *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62.

[9] P. *v.* Strybe (Cal.), 36 Pac. 3.

for instance, the woman in adultery [1] or in abortion.[2] But rather inconsistently it has been held that in a prosecution for a wrongful sale of liquor the buyer is not an accomplice,[3] and that in a prosecution for taking money to withhold evidence of a crime, the one who gives the money is not an accomplice.[4]

§ 288. **The court may in its discretion grant a view** in any case in which it may be useful to the jury to see the premises.[5] The view may be granted even outside the county.[6] A view may be granted, even after the case is closed, if the defendant requests it.[7] Any interference with the jury during the view, if it might be prejudicial to the defendant, is ground for a new trial.[8]

Whether a view is part of the trial or not is uncertain; but defendant even in a capital case may waive his right to be present at a view, as by asking for it or assenting to it without desiring to be present.[9]

[1] S. *v.* Scott, 28 Or. 331, 42 Pac. 1.

[2] S. *v.* McCoy, 52 Oh. S. 157, 39 N. E. 816.

[3] C. *v.* Downing, 4 Gray 29.

[4] S. *v.* Quinlan, 40 Minn. 55, 41 N. W. 299.

[5] P. *v.* Southern, 120 Cal. 645, 53 Pac. 214; Chute *v.* S., 19 Minn. 271.

[6] Jones *v.* S., 51 Oh. S. 331, 38 N. E. 79.

[7] P. *v.* Hawley, 111 Cal. 78, 43 Pac. 404.

[8] P. *v.* Johnson, 110 N. Y. 134, 17 N. E. 684.

[9] Shular *v.* S., 105 Ind. 289, 4 N. E. 870; P. *v.* Thorn, 156 N. Y. 286, 50 N. E. 947; Blythe *v.* S., 47 Oh. S. 234, 24 N. E. 268.

CHAPTER XXX.

THE BURDEN OF PROOF.

§ 289. **The burden of proving a case is on the prosecution.** All elements of the case must be proved, the intent, as well as the act. This burden is always upon the prosecution, and no state of the evidence will shift it. Thus the prosecution cannot satisfy the burden of proof simply by establishing a strong case and calling upon the defendant to disprove it. No matter how strong the *prima facie* case of the State, the burden of proof does not shift.[1]

Thus where the evidence offered by the defendant is of an *alibi*, — that is, that he was at another place at the time the crime was committed, and therefore could not have committed it — he is obviously merely disproving the truth of the prosecution's evidence or inference from evidence; he is making an entirely negative defence. It is not for him to establish an *alibi*, but simply to throw doubt on the case for the prosecution. Clearly, therefore, when he produces evidence tending to prove an *alibi*, no burden is on him; if he raises a reasonable doubt of the charge he is to be acquitted.[2]

[1] Chaffee *v.* U. S., 18 Wall. 516; Haskins *v.* S., 46 Neb. 888, 65 N. W. 894; Baker *v.* S., 80 Wis. 416, 50 N. W. 518.

[2] P. *v.* Roberts, 122 Cal. 377, 55 Pac. 137; Carlton *v.* P., 150 Ill. 181, 37 N. E. 244; Parker *v.* S., 136 Ind. 284, 35 N. E. 1105; S. *v.*

Proof of insanity is disproof of the culpable intent, and hence a negative defence in its nature; and therefore though the burden of introducing evidence is, of course, on the defendant, the burden of proof should remain on the prosecution. The defendant should be acquitted if the evidence raises a reasonable doubt of his sanity. And the weight of authority is to that effect.[1] In many jurisdictions, however, the burden of proving insanity by a preponderance of the evidence is said to be upon the defendant: upon the mistaken notion that it is an affirmative defence, or upon the untenable ground that the presumption of sanity remains until "driven out" by a preponderance of evidence.[2]

Where an indictment charges an act which according to its circumstances may be of greater or less degree, the prosecution must prove not merely the doing of the act, but also the necessary circumstances or specific intent to make the act of a higher

Tatlow, 136 Mo. 678, 38 S. W. 552. *Contra*, S. *v.* Beasley, 84 Ia. 83, 50 N. W. 570.

[1] Davis *v.* U. S., 160 U. S. 469; Dacey *v.* P., 116 Ill. 555, 6 N. E. 165; Plake *v.* S., 121 Ind. 433, 23 N. E. 273; S. *v.* Nixon, 32 Kan. 205, 4 Pac. 159; P. *v.* Garbutt, 17 Mich. 9; Wright *v.* P., 4 Neb. 407; S. *v.* Bartlett, 43 N. H. 224; Brotherton *v.* P., 75 N. Y. 159.

In Massachusetts this view is now adopted by the courts, as a result of the decision in C. *v.* Heath, 11 Gray 303, though the earlier cases are opposed. See C. *v.* Pomeroy, Whart. Hom. (2d ed.) Append.; Davis *v.* U. S., 160 U. S. 469, 482.

[2] Parsons *v.* S., 81 Ala. 577, 2 So. 854; P. *v.* Bawden, 90 Cal. 195, 27 Pac. 204; U. S. *v.* Guiteau (D. C.), 10 Fed. 161; S. *v.* Felter, 32 Ia. 49; Smith *v.* C., 1 Duv. 224; S. *v.* Lawrence, 57 Me. 574; Bonfanti *v.* S., 2 Minn. 123; S. *v.* Huting, 21 Mo. 464; S. *v.* Spencer, 1 Zab. (21 N. J.) 196; S. *v.* Potts, 100 N. C. 457; Clark *v.* S., 12 Oh. 495 *n.*; Ortwein *v.* C., 76 Pa. 414; Burt *v.* S. (Tex. Cr.), 40 S. W. 1000; Boswell *v.* C., 20 Grat. 860.

degree.[1] This obvious principle has, however, been neglected in several cases. Thus, where a killing is shown and nothing more, it is held in Massachusetts that the defendant should be held guilty of murder in the first degree, the burden of introducing evidence of the circumstances being on the defendant; but if any evidence is introduced by the defendant, the burden is still on the government to prove the degree of the offence.[2] In Virginia and West Virginia, voluntary killing being shown, it is presumed malicious, and murder in the second degree; the burden is on the prosecution to prove it murder in the first degree, but on the defendant to prove it manslaughter.[3] In Illinois, by statute, if killing is proved, the burden of proving circumstances of mitigation or justification is on the defendant, unless the proof on the part of the prosecution sufficiently manifests the mitigation or excuse.[4] And the same statute prevails in California.[5] The burden on the defence is simply that of introducing evidence; the prosecution must still prove all elements of the crime beyond a reasonable doubt.[6]

§ 290. **The burden of introducing evidence may, however, be on the defendant.** For after making out a *prima facie* case the prosecution may rest, since, if no further evidence is introduced, a conviction will

[1] Newport *v.* S., 140 Ind. 299, 39 N. E. 926; Maher *v.* P., 10 Mich. 212.

[2] C. *v.* York, 9 Met. 93.

[3] Robertson *v.* C. (Va.), 20 S. E. 362; S. *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380.

[4] Smith *v.* P., 142 Ill. 117, 31 N. E. 599.

[5] P. *v.* Neary, 104 Cal. 373, 37 Pac. 943.

[6] P. *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549.

follow. If the defendant is to protect himself against conviction, he must bring in evidence which will counteract the case of the prosecution. Thus, if the evidence of the prosecution makes out a good *prima facie* case, and the defendant hopes to prove an *alibi*, he must introduce evidence tending to prove the *alibi:* this evidence being in the case, the prosecution must meet it sufficiently to make out a case on the whole evidence.[1]

The prosecution is often helped in making out a *prima facie* case by some presumption, against which the defendant must introduce evidence. Thus every man is presumed sane: the prosecution may rely on this presumption, and even in those States where the burden of proof of sanity is on the prosecution, the defendant must introduce evidence tending to show insanity.

Another presumption of similar importance is that of intention. If the voluntary doing of an act is shown, the culpable intent or *mens rea* is presumed, and it rests with the defendant to introduce evidence that it did not exist, — as by showing it to be an accident, or done under a mistake of fact, or while insane. This introduced, the burden of proof is on the prosecution. So where evidence is introduced by the defendant tending to show that the act was accidental, the burden is on the prosecution to prove the *mens rea* beyond a reasonable doubt.[2]

Where, however, the defendant is between seven and fourteen years of age, there is no culpable intent presumed, and the burden is upon the prosecution

[1] C. *v.* Choate, 105 Mass. 451.

[2] S. *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

both of introducing evidence of the *mens rea* and of establishing it beyond a reasonable doubt.[1]

Where the truth of a negative averment (like the absence of a license to sell liquor) is peculiarly within the knowledge of the defendant, it is held that the burden of disproving the negative is upon him. What is meant is only that he has the burden of introducing evidence.[2]

§ 291. **Where there is a true affirmative defence, the intentional doing of the criminal act being admitted and an excuse for it set up by the defendant, it would seem that the burden should be on the defendant to establish the defence by a preponderance of the evidence.** And it is so held in some States in the case of self-defence.[3] And the same rule has been applied in the case of other affirmative defences. Thus it has been held that the defence that one was acting by authority of law must be established by the defendant;[4] and that where adultery of the wife is a defence to a prosecution for neglecting to support the wife, the defendant must prove the adultery by a preponderance of evidence.[5] So the defence of truth in a prosecution for slander must be established by a preponderance of evidence.[6] So it has been held that, former jeopardy

[1] R. *v.* Smith, 1 Cox C. C. 260; Angelo *v.* P., 96 Ill. 209; C. *v.* Mead, 10 All. 398.

[2] S. *v.* Ahern, 54 Minn. 195, 55 N. W. 959; S. *v.* Keggon, 55 N. H. 19.

[3] S. *v.* Byrd, 121 N. C. 684, 28 S. E. 353; S. *v.* Ballou (R. I.), 40 Atl. 861; Wilcox *v.* S., 33 Tex. Cr. R. 392, 26 S. W. 989; S. *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380. The reasoning in S. *v.* Lawrence, 57 Me. 574, would lead to the same result.

[4] Featherston *v.* S., 35 Tex. Cr. R. 612, 34 S. W. 938.

[5] S. *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787.

[6] Manning *v.* S., 37 Tex. Cr. R. 180, 39 S. W. 118 (*semble*).

being an affirmative defence, the burden of proof of it is on the defendant.[1]

But in many and perhaps in most jurisdictions a different rule prevails. All affirmative defences (except that of former conviction or acquittal) are provable under the plea of *not guilty*, and the affirmative of the issue is on that account technically with the prosecution; they therefore hold that, in spite of the nature of the defence, the burden of proof properly so called, including the burden of disproving beyond. a reasonable doubt the affirmative defence, lies on the prosecution.[2]

§ 292. **The jury must be convinced of the defendant's guilt beyond a reasonable doubt,**[3] even in cases of misdemeanor.[4]

The doubt must not be whimsical, or based on groundless conjecture;[5] it must arise out of the evidence or lack of evidence.[6] So long as a single juror has a reasonable doubt of guilt, there should

[1] S. *v.* Scott, 1 Kan. App. 748, 42 Pac. 264; O'Connor *v.* S., 28 Tex. App. 288, 13 S. W. 14.

[2] U. S. *v.* Lunt, 1 Spra. 311; Miller *v.* S., 107 Ala. 40, 19 So. 37; P. *v.* Marshall, 112 Cal. 422, 44 Pac. 718; S. *v.* Fowler, 52 Ia. 103, 2 N. W. 983; C. *v.* M'Kie, 1 Gray 61; Gravely *v.* S., 38 Neb. 871, 57 N. W. 751; P. *v.* Riordan, 117 N. Y. 71, 22 N. E. 455 (but see P. *v.* Schryver, 42 N. Y. 1). In C. *v.* M'Kie, 1 Gray 61, the court suggested that where the defence set up an authority conferred by a legal writ, the burden of proving it might be on the defendant.

[3] P. *v.* Brannon, 47 Cal. 96; S. *v.* Raymond, 53 N. J. L. 260, 21 Atl. 328.

[4] C. *v.* M'Kie, 1 Gray 61; P. *v.* Potter, 89 Mich. 353, 50 N. W. 994; Vandeventer *v.* S., 38 Neb. 592, 57 N. W. 397.

[5] P. *v.* Ross, 115 Cal. 233, 46 Pac. 1059.

[6] Voght *v.* S., 145 Ind. 12, 43 N. E. 1049; S. *v.* Case, 96 Ia. 264, 65 N. W. 149 (*semble*).

not be a conviction;[1] but there should not be an acquittal so long as some jurors have no reasonable doubt of guilt; if the jurors differ as to the guilt of the accused they must disagree.[2]

Efforts have been made to establish a proper form of words by which to express to the jury the nature of the rule requiring proof beyond a reasonable doubt. Among phrases commonly used are instructions that the truth of the indictment must be proved "to a reasonable and moral certainty;" the jury must feel "an abiding conviction to a moral certainty of the truth of the charge;" "a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously on it."[3] It has also been held proper to charge that the proof "must preclude every reasonable hypothesis except that of guilt."[4]

A common and approved form of instruction is that "the proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary prudent men with a conviction on which they would act in their own most important concerns and affairs of life."[5] In some States the court must add that

[1] Parker *v.* S., 136 Ind. 284, 35 N. E. 1105; S. *v.* Rogers, 56 Kan. 362, 43 Pac. 256.

[2] S. *v.* Rogers, 56 Kan. 362, 43 Pac. 256.

[3] Little *v.* P., 157 Ill. 153, 42 N. E. 389; C. *v.* Webster, 5 Cush. 295, 320; Morgan *v.* S., 48 Oh. S. 371, 27 N. E. 710.

[4] Rhodes *v.* S., 128 Ind. 189, 27 N. E. 866; P. *v.* Ezzo, 104 Mich. 341, 62 N. W. 407.

[5] Lawhead *v.* S., 46 Neb. 607, 65 N. W. 779; Emery *v.* S., 92 Wis. 146, 65 N. W. 848. But see C. *v.* Miller, 139 Pa. 77, 21 Atl. 138.

they must act on such a conviction without hesitation.[1]

The use of the words "a fixed conviction" is misleading and bad;[2] so is the phrase "doubt that you can give a reason for," since a bad reason may be given.[3] It is too much to require certainty "such as to remove all doubt from the mind of a reasonable man,"[4] since a reasonable man may feel an unreasonable doubt. It is not a proper instruction to tell the jurors that they cannot disbelieve as jurors if they believe as men;[5] and it is requiring too much to instruct that they should convict unless they feel an intelligent conviction that the case has not been proved.[6] An instruction that it is better that ninety-nine guilty should escape than one innocent suffer is rightly refused.[7] It is not error to charge affirmatively that if convinced beyond a reasonable doubt the jury should convict.[8] An acquittal should not be directed if there is reasonable doubt of a single fact among all the circumstances relied upon by the prosecution. Though the truth of some parts of the case be doubted, conviction should be had if the jury feels no reasonable doubt on the main issue of guilt.[9]

[1] Brown *v.* S., 105 Ind. 385, 5 N. E. 900; S. *v.* Rosener, 8 Wash. 42, 35 Pac. 357. But see P. *v.* Lenon, 79 Cal. 625, 21 Pac. 967.

[2] Adams *v.* S., 115 Ala. 90, 22 So. 612.

[3] Morgan *v.* S., 48 Oh. S. 371, 27 N. E. 710.

[4] Padfield *v.* P., 146 Ill. 660, 35 N. E. 469.

[5] Adams *v.* S., 135 Ind. 571, 34 N. E. 956; Siberry *v.* S., 133 Ind. 677, 33 N. E. 681.

[6] Hoffman *v.* S., 97 Wis. 571, 73 N. W. 51.

[7] Seacord *v.* P., 121 Ill. 623, 13 N. E. 194; Coleman *v.* S., 111 Ind. 563, 13 N. E. 100.

[8] Reynolds *v.* S., 147 Ind. 3, 46 N. E. 31.

[9] P. *v.* Phipps, 39 Cal. 326; Bressler *v.* P., 117 Ill. 422, 8 N. E.

"It has been doubted by many eminent judges and text-writers whether attempts to explain the meaning of the term 'reasonable doubt' do not lead to confusion and misunderstanding in the minds of the jury, rather than to clear comprehension; the term itself being as easily and readily understood as any definition of it."[1]

§ 293. **Presumptions relieve from the duty of going forward with evidence, but are not themselves evidence.**[2] It is impossible to compare these two sorts of probative matter, presumption and evidence, and to weigh them against each other. The effort to do this, however, is the foundation of a recent much-mooted decision in which it was held that the presumption of innocence should be stated to the jury in favor of the prisoner, though it has already been stated that he must be proved guilty beyond a reasonable doubt, since he is entitled to have the presumption weighed against the evidence.[3] It has been held, however, that the rule laid down in this case is satisfied if the jury are instructed that the defendant starts with the presumption of innocence in his favor, but that this presumption is driven out of the case when the charge is proved beyond a reasonable doubt.[4]

The doctrine of the case just referred to is not ac-

62; S. *v.* Crawford, 34 Mo. 200; S. *v.* Myers, 12 Wash. 77, 40 Pac. 626. But see Kollock *v.* S., 88 Wis. 663, 60 N. W. 817.

[1] Gardner *v.* S., 55 N. J. L. 17, 26 Atl. 30.

[2] Thayer, Prelim. Treat. Evid. ch. 8.

[3] Coffin *v.* U. S., 156 U. S. 432; Franklin *v.* S., 92 Wis. 269, 66 N. W. 107. See P. *v.* O'Brien, 106 Cal. 104, 39 Pac. 325; S. *v.* Nicholls, 50 La. Ann. 699, 23 So. 980. An elaborate criticism of Coffin *v.* U. S. will be found in Thayer, Prelim. Treat. Evid. p. 551 and following.

[4] Allen *v.* U. S., 164 U. S. 492.

cepted in all jurisdictions. It has been well held in a recent case in Michigan[1] that the presumption of innocence is the reason for the rule that guilt must be proved beyond a reasonable doubt; and that having stated the rule it is unnecessary also to state the reason for it. It may be hoped that this sensible doctrine will in the end prevail.

Much ingenuity is spent on the weighing against each other of presumptions. As to presumptions which are merely natural inferences from proved facts, they cannot be weighed against the abstract presumptions of innocence, sanity, etc.[2] Therefore, in a prosecution for seduction the presumption of chastity will not serve to convict of seducing a chaste woman where no evidence as to the woman's chastity, or lack of chastity, is introduced; or, in language sometimes used, the presumption of innocence overrides the presumption of chastity.[3]

[1] P. *v.* Parsons, 105 Mich. 177, 63 N. W. 69.

[2] Dunlop *v.* U. S., 165 U. S. 486.

[3] P. *v.* Roderigas, 49 Cal. 9; C. *v.* Whittaker, 131 Mass. 224; Zabriskie *v.* S., 43 N. J. L. 640.

CHAPTER XXXI.

VARIANCE.

§ 294. **If the evidence presented at the trial varies in a material particular from the description of the crime in the indictment, there must be an acquittal because of the variance.** The crime described has not in such a case been proved; and though a similar crime has been proved, there can be no conviction, because that crime was not charged, and there can be no conviction except of the very crime charged.

If, however, the variance is in an immaterial fact, it may not be fatal. Such a fact will, if possible, be rejected as surplusage, and will then have no effect to prevent a conviction.[1] The unnecessary fact may, however, be a part of the description, and in that case it cannot be rejected as surplusage, and a variance in the proof of it will be fatal.[2]

Examples of fatal variance have already been considered; such are variances in the description of personal property,[3] in the recital of a written instrument,[4] and in the allegation of intent.[5] A few more examples may usefully be collected here. Thus upon an indictment for refusal to work upon a certain road, it is variance to prove that the refusal was to work

[1] *Ante*, § 110.
[2] *Ante*, § 112.
[3] *Ante*, § 172.
[4] *Ante*, § 174.
[5] *Ante*, § 136.

on another road in the same county.[1] An indictment for exhibiting pictures of naked girls is not proved by evidence of exhibiting pictures of girls naked to the waist.[2] When the indictment charged larceny of a bottle of whiskey, it was a variance to prove that the whiskey was drawn from a cask into the defendant's bottle.[3] In an indictment for slander, a difference between the language alleged and that proved is material.[4]

On the other hand, an indictment for robbery by violence is supported by proof of robbery by the use of firearms;[5] and an allegation of the intentional killing of one person is supported, it has been held, by proof of an intent to kill another, when the person named was the actual victim.[6]

Where breaking and entering in the daytime is a criminal offence, and breaking and entering in the night-time a more serious offence, the indictment may allege simply a breaking and entering, and there may then be a conviction of the less offence.[7] But if the crime is described as committed in the night-time, it has been held that this is a descriptive allegation which must be proved; and therefore there can be no conviction of breaking and entering in the daytime.[8] A similar distinction appears to be recog-

[1] Wynn *v.* S. (Tex. Cr.), 42 S. W. 289.

[2] C. *v.* Dejardin, 126 Mass. 46. [3] C. *v.* Gavin, 121 Mass. 54.

[4] Berry *v.* S., 27 Tex. App. 483, 11 S. W. 521.

[5] Farrell *v.* S. (Tex. Cr.), 44 S. W. 1108.

[6] S. *v.* Barr, 11 Wash. 481, 39 Pac. 1080.

[7] C. *v.* Reynolds, 122 Mass. 454; S. *v.* Anselm, 43 La. Ann. 195, 8 So. 583. See Hopkins *v.* C., 3 Met. 460.

[8] Bromley *v.* P., 150 Ill. 297, 37 N. E. 209. In C. *v.* Uhrig, 167 Mass. 420, 45 N. E. 1047, the court expressed no opinion on the point.

nized in indictments for burning. Burning a dwelling-house being a serious offence, and burning any other house an offence less serious, an indictment may charge the burning of a house, and the indictment may be proved by evidence of burning a dwelling-house.[1] If, however, the indictment charges the burning of a dwelling-house, the word "dwelling" is descriptive and cannot be rejected; there can therefore be no conviction for the crime of burning a house.[2]

§ 295. **Statutes have often provided that there shall be no acquittal for an immaterial variance,**[3] as that "There shall be no acquittal on the ground of variance between allegations and proof in any case where the essential facts of the offence are correctly stated, unless the defendant is thereby prejudiced in his defence."[4] Such a statute is constitutional.[5]

§ 296. **It is not necessary that the grand jury should have intended by their indictment the same act that is proved at the trial.** If at the trial an act is proved which is sufficiently described by the indictment, it cannot be shown that the grand jury had another act in mind.[6]

CONVICTION OF A LESS CRIME.

§ 297. **It is enough to prove so much of an indictment as shows the defendant to have been guilty of an offence punishable by law, though more was charged in the in-**

[1] C. *v.* Smith, 151 Mass. 491, 24 N. E. 677.

[2] C. *v.* Hayden, 150 Mass. 332, 23 N. E. 51.

[3] Burdge *v.* S., 53 Oh. S. 512, 42 N. E. 594.

[4] Mass. Stat. 1899, c. 409, § 4.

[5] C. *v.* Hall, 97 Mass. 570.

[6] Rosen *v.* U. S., 161 U. S. 29; C. *v.* Davis, 11 Pick. 432; S. *v.* Adams, 20 Or. 525, 26 Pac. 837.

dictment.[1] And this is true, although the indictment as a whole charged a different offence from that proved. It often happens that an indictment for a certain offence would by the omission of a word or a phrase become a good indictment for a different offence. In such a case it is generally sufficient for conviction either to prove the whole indictment or to prove that part which charges the different offence. The ordinary application of this rule is to an indictment which, in stating a serious offence, describes also a less offence included within it. The principle is, however, at common law subject to one important exception, as follows: —

§ 298. **At common law, on an indictment for felony, there could be no conviction of misdemeanor, though a charge of the misdemeanor was included within the indictment.**[2] The reason for this seemingly arbitrary rule was that the incidents of trial were so different in the case of felonies and misdemeanors that a defendant could not properly be tried on both charges at once. This difference has now disappeared; and either by statute[3] or by a change in the common law as a result of the change in incidents of trial, it is now generally held that even on an indictment for felony one may be convicted of a misdemeanor which is also charged in the indictment.[4]

[1] R. *v.* Hollingberry, 4 B. & C. 329; C. *v.* Leonard, 11 Gray 458.

[2] R. *v.* Westbeer, 2 Stra. 1133, 1 Leach C. C. 12; C. *v.* Roby, 12 Pick. 496; C. *v.* Gable, 7 S. & R. 423.

[3] 14 & 15 Vict. c. 100; Mass. Pub. Stat. c. 214, § 18. Such a statute is constitutional. C. *v.* Lang, 10 Gray 11.

[4] P. *v.* Jackson, 3 Hill 92; Hunter *v.* C., 79 Pa. 503.

§ 299. **On an indictment for a serious crime, the defendant may be convicted of any less serious offence which is sufficiently charged in the indictment.** Thus on an indictment for murder, the defendant may be convicted of manslaughter, the allegation that the killing was of malice aforethought remaining unproved, while the rest of the indictment is proved.[1] And so on an indictment charging a murder, and that the defendant became accessory to it after the fact, it may be proved that the principal offence was manslaughter.[2] So a conviction of assault and battery may be had on an indictment for murder,[3] for rape,[4] or for any other crime in which violence to the person is charged. On an indictment for an aggravated assault, there may be a conviction of a simple assault (without battery); as on an indictment for assault with intent to kill or commit some other felony,[5] or for assault on an officer.[6]

A charge of grand larceny includes one of petit larceny, and there may therefore be a conviction of the latter on an indictment for the former.[7] And similarly on an indictment for an aggravated form of stealing there may be a conviction of simple lar-

[1] Brennan *v.* P., 15 Ill. 511; Pigg *v.* S., 145 Ind. 560, 43 N. E. 309.

[2] S. *v.* Burbage, 51 S. C. 284, 28 S. E. 937.

[3] S. *v.* Parker, 66 Ia. 586, 24 N. W. 225. But see P. *v.* Adams, 52 Mich. 24, 17 N. W. 226.

[4] S. *v.* Kyne, 86 Ia. 616, 53 N. W. 420; C. *v.* McCarty, 165 Mass. 37, 42 N. E. 336.

[5] C. *v.* Kennedy, 131 Mass. 584; S. *v.* Dolan, 17 Wash. 499, 50 Pac. 472.

[6] C. *v.* Kirby, 2 Cush. 577.

[7] Bolling *v.* S., 98 Ala. 80, 12 So. 782; P. *v.* McElroy, 116 Cal. 583, 48 Pac. 718.

ceny;[1] and on an indictment for burglary armed, of simple burglary.[2]

The indictment for burglary may contain an allegation of breaking and entering with intent to steal, and stealing after the entry; on such an indictment there may be a conviction of simple larceny,[3] but not of breaking and entering with intent to steal, since that is not charged.[4]

§ 300. **The less crime for which conviction is had must be sufficiently and explicitly charged in the indictment.** If one crime is charged and another proved, which, though of a similar nature, is not expressly charged, there can be no conviction.[5] Thus on an indictment for an offence there can be no conviction at common law of an attempt to commit the offence, or of being accessory to the offence.[6] So on a statutory indictment for homicide, which does not charge a battery, there can be no conviction of battery;[7] on an indictment for an aggravated assault (not charging a battery) there can be no conviction of a battery;[8] on an indictment for shooting, a conviction cannot be had for a battery by striking.[9]

[1] Robbery: P. *v.* McGowan, 17 Wend. 386. Larceny from house: Brown *v.* S., 90 Ga. 454, 16 S. E. 204.

[2] S. *v.* Miller, 45 La. Ann. 1170, 14 So. 136.

[3] C. *v.* Hathaway, 14 Gray 392.

[4] Vandercomb's Case, 2 Leach C. C. 708.

[5] S. *v.* Bigelow, 101 Ia. 430, 70 N. W. 600; Linden Park B. H. Assoc. *v.* S., 55 N. J. L. 557, 27 Atl. 1091.

[6] S. *v.* Green, 119 N. C. 899, 26 S. E. 112. Conviction under such circumstances is often allowed by statute. N. Y. Co. Crim. Pro. § 444.

[7] P. *v.* Adams, 52 Mich. 24, 17 N. W. 226.

[8] S. *v.* McAvoy, 73 Ia. 557, 35 N. W. 630; Turner *v.* Muskegon Circuit Judge, 88 Mich. 359, 50 N. W. 310.

[9] C. *v.* Heath, 99 Ky. 182, 35 S. W. 277. See S. *v.* Robertson, 48 La. Ann. 1067, 20 So. 296, which goes still further, and it would seem too far.

If, however, all necessary facts to constitute the less crime are charged, there may be a conviction of it, though the charge is not accurate in form. Thus where an indictment for aggravated assault, though not formally charging a battery, contained an averment of violence to the person of the victim, a conviction was had for assault and battery.[1] So on an indictment for wilfully and maliciously wounding, in which the word *assault* was not used, a conviction of simple assault was sustained.[2] And on an indictment for assault with a pistol with intent to kill, a conviction of the offence of pointing a pistol at a person has been sustained.[3]

In crimes involving a specific intent, though the intent required for a less crime may not be precisely that required for the greater one charged in the indictment, yet if necessarily included in it there may be a conviction of the less crime. Thus on an indictment for assault with intent to maim, or with intent to kill, there may be a conviction of assault with intent to inflict great bodily harm.[4] So where burglary with intent to rob is charged, there may be a conviction of burglary with intent to steal.[5]

On this principle it has been held that on a charge of assault with intent to murder, it is proper to convict of an assault with intent to kill,[6] or to inflict

[1] C. *v.* Thompson, 116 Mass. 346.

[2] R. *v.* Taylor, L. R. 1 C. C. 194.

[3] Jenkins *v.* S., 92 Ga. 470, 17 S. E. 693.

[4] P. *v.* Congleton, 44 Cal. 92; S. *v.* Akin, 94 Ia. 50, 62 N. W. 667. *Contra*, S. *v.* Ackles, 8 Wash. 462, 36 Pac. 597, on the peculiar form of the statute.

[5] P. *v.* Crowley, 100 Cal. 478, 35 Pac. 84.

[6] S. *v.* Nichols, 8 Conn. 496; Beckwith *v.* P., 26 Ill. 500; S. *v.* White, 45 Ia. 325.

great bodily harm,[1] or with intent to commit murder in the second degree.[2] So an assault with intent to kill, described as being made with a weapon which in fact is a deadly one, will justify a conviction of assault with a deadly weapon.[3] But an indictment for assault with intent to murder will not justify a conviction of assault with intent to maim, since the intent to maim is not necessarily included in the intent to murder.[4]

It would seem that since an allegation that one did an act includes an allegation that he intentionally did it,[5] an allegation of intent to do it might be included within the charge. It has been so held in this country. An indictment for rape includes an allegation of assault; on such an indictment one may be convicted of assault with intent to commit rape.[6] On the other hand, it has been held in England that on an indictment for robbery there could be no conviction of assault with intent to rob.[7] This was decided on the authority of Vandercomb's Case,[8] in which it was held that on an indictment for breaking and entering and stealing there could be no conviction of breaking and entering with intent to steal. It is perhaps possible, however, to distinguish the cases. The breaking and the stealing are necessarily successive acts; the indictment may be construed as

[1] S. *v.* Schele, 52 Ia. 608, 3 N. W. 632.

[2] S. *v.* Williams, 23 N. H. 321.

[3] Fleming *v.* S., 107 Ala. 11, 18 So. 263; Evans *v.* T. (Ari.), 36 Pac. 209.

[4] Kilkelly *v.* S., 43 Wis. 604.

[5] *Ante*, § 135.

[6] C. *v.* Cooper, 15 Mass. 187; S. *v.* Mueller, 85 Wis. 203, 55 N. W. 165.

[7] R. *v.* Reid, 2 Den. C. C. 88.

[8] 2 Leach C. C. 708.

charging breaking with intent to break and stealing with intent to steal, but not breaking with intent to steal, which is required. In the case of rape and robbery, on the other hand, the assault and the other acts are simultaneous; if, therefore, an intent to do the act of rape or of robbery is averred, there is a sufficient charge of assault with intent to do the act.

Whether on indictment for one incontinent crime there can be conviction of another depends on the statutory definitions of the two crimes; and the definitions of such crimes differ materially in different jurisdictions. Thus on an indictment for rape it has been held there can be no conviction of fornication,[1] or of incest;[2] but where in the indictment the victim was stated to be defendant's daughter, it has been held there may be a conviction of incest;[3] and where proper allegations appeared, of adultery.[4] One may be convicted of fornication on an indictment for seduction[5] or adultery.[6]

[1] C. *v.* Murphy, 2 All. 163; S. *v.* Shear, 51 Wis. 460, 8 N. W. 287.

[2] S. *v.* Thomas, 53 Ia. 214, 4 N. W. 908. *Contra*, S. *v.* Cowell, 4 Ire. 231.

[3] C. *v.* Goodhue, 2 Met. 193.

[4] C. *v.* Squires, 97 Mass. 59.

[5] Dinkey *v.* C., 17 Pa. 126.

[6] R. *v.* Roberts, 1 Yeates 6; S. *v.* Cowell, 4 Ire. 231. But see Cosgrove *v.* S., 37 Tex. App. 249, 39 S. W. 367.

CHAPTER XXXII.

ELECTION AND QUASHING.

§ 301. **Where evidence has been admitted which shows more than one commission of the described offence by the defendant, the prosecution should be required to elect which act it will rely upon to prove the indictment.**[1] Election is not required, however, where the two acts are so closely connected as to form a single offence,[2] nor where the separate acts make up a continuous crime;[3] and where several sales of liquor were proved, all to the same person, but no special circumstances were shown nor the date of any sale, it was held not a proper case for election.[4]

Election cannot be required until all the evidence for the prosecution has been presented;[5] and so long as the defendant is not hampered in his defence, it seems to be within the discretion of the court to defer election until after evidence is presented by the defendant.[6] If the case goes to the jury without election,

[1] Nuckols *v.* S., 109 Ala. 2, 19 So. 504; S. *v.* Lund, 49 Kan. 663, 31 Pac. 309; Palin *v.* S., 38 Neb. 862, 57 N. W. 743.

[2] Ellis *v.* S., 105 Ala. 72, 17 So. 119; S. *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446.

[3] P. *v.* Elmer, 109 Mich. 493, 67 N. W. 550.

[4] S. *v.* Kerr, 3 N. D. 523, 58 N. W. 27.

[5] S. *v.* Hurd, 101 Ia. 391, 70 N. W. 613; S. *v.* Acheson, 91 Me. 240, 39 Atl. 570.

[6] S. *v.* Acheson, 91 Me. 240, 39 Atl. 570; S. *v.* White (Vt.), 39 Atl. 1085.

the defendant is protected from further prosecution for any of the acts covered by the evidence.[1]

§ 302. Where an indictment contains several counts, election between the counts may be required in a proper case. But usually where the trial is allowed to proceed upon several counts a proper case for election will not arise at the trial. For if the several counts contain different descriptions of the same offence, as by the statement of different means,[2] no case for election seems to be presented;[3] though if the trial court should, under the circumstances of the case, require an election, its discretion would hardly be controlled.[4] Even if different offences are stated in the different counts, if they are so closely connected together, growing out of the same transaction, that the evidence offered in support of them is identical, an election will not generally be required. So an election has been properly refused between counts for murder and accessory to murder,[5] for murder and for manslaughter,[6] and for manslaughter in the first and in the second degree;[7] between counts for incest and for rape upon the same woman;[8] between counts for burglary and for larceny,[9] for larceny

[1] Deshazo *v.* S., 65 Ark. 88, 44 S. W. 453; S. *v.* Kerr, 3 N. D. 523, 58 N. W. 27.

[2] Moore *v.* S., 37 Tex. Cr. R. 552, 40 S. W. 287.

[3] S. *v.* Lanahan, 144 Mo. 31, 45 S. W. 1090; Furst *v.* S., 31 Neb. 403, 47 N. W. 1116; P. *v.* Wright, 136 N. Y. 625, 32 N. E. 629.

[4] P. *v.* Willson, 109 N. Y. 345, 16 N. E. 540.

[5] S. *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831.

[6] Kelly *v.* P., 17 Col. 130, 29 Pac. 805.

[7] P. *v.* McCarthy, 110 N. Y. 309, 18 N. E. 128.

[8] Porath *v.* S., 90 Wis. 527, 63 N. W. 1061.

[9] Rose *v.* S., 117 Ala. 77, 23 So. 638.

and for receiving the same property,[1] for embezzlement and for obtaining the same property by false pretences,[2] for obtaining promissory notes and for obtaining the signature to the same notes,[3] for stealing cattle and for altering the brand on the cattle;[4] for forgery and for uttering the forged document,[5] for keeping open a shop on Sunday and for selling at the same time.[6]

§ 303. **It is within the discretion of the court whether to order an election by the prosecution**; and this discretion will not be controlled in an appellate court, except in an extraordinary case.[7] In a few cases, however, it has been held error to order an election in a case not proper for it.[8] If an election is ordered during the trial, it will have the effect of an acquittal as to the count, or the offence which, having been investigated, the prosecution elects no further to prosecute; since the defendant has already been in jeopardy because of it.

In order to have the prosecution required to elect, the defendant must ask for an election; if he does not do so, he cannot be heard to complain that none

[1] Andrews *v.* P., 117 Ill. 195, 7 N. E. 265; Whiting *v.* S., 48 Oh. S. 220, 27 N. E. 96.

[2] Greenwood *v.* S. (Tex. Cr.), 44 S. W. 177.

[3] S. *v.* House, 55 Ia. 466, 8 N. W. 307.

[4] Howard *v.* S., 108 Ala. 571, 18 So. 813.

[5] P. *v.* Warner, 104 Mich. 337, 62 N. W. 405.

[6] Brown *v.* S. (Tex. Cr.), 44 S. W. 176.

[7] C. *v.* Smith, 162 Mass. 508, 39 N. E. 111; S. *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831.

[8] S. *v.* Baily, 50 Oh. S. 636, 36 N. E. 233; Gonzales *v.* S., 12 Tex. App. 657.

was required.[1] The motion must be made before the prosecution has rested its case.[2]

NOLLE PROSEQUI.

§ 304. **The prosecuting attorney may at any time before sentence dismiss the prosecution** by entering what is known as a *nolle prosequi*. This may be done freely before the empanelling of a jury, and in that case it does not interfere with a subsequent prosecution.[3] If entered during the trial or after verdict, it of course bars further prosecution,[4] but not if entered after a new trial has been granted at the defendant's request.[5]

Part of an indictment may be "*nol. prossed*," leaving the rest as a single count, or even part of a count.[6] Thus a matter of aggravation,[7] like a malicious or felonious intent,[8] may be omitted; or the charge of larceny in an indictment for burglary which contains it.[9] So where the indictment charges injury to two pieces of property, the prosecutor may enter a *nolle prosequi* as to one; in an indictment for arson of a house and barn, the barn may be dropped out.[10]

[1] Mitchell *v.* P., 24 Col. 532, 52 Pac. 671; Johns *v.* S. (Tex. Cr.), 38 S. W. 619.

[2] Hemingway *v.* S., 68 Miss. 371, 8 So. 317.

[3] O'Brien *v.* S., 91 Ala. 25, 8 So. 560; *Ex parte* Foss, 102 Cal. 347, 36 Pac. 669; Dye *v.* S., 130 Ind. 87, 29 N. E. 771; C. *v.* Galligan, 156 Mass. 270, 30 N. E. 1142; Dulin *v.* Lillard, 91 Va. 718, 20 S. E. 821.

[4] C. *v.* Tuck, 20 Pick. 356.

[5] C. *v.* McClusky, 151 Mass. 488, 25 N. E. 72.

[6] C. *v.* Uhrig, 167 Mass. 420, 45 N. E. 1047; C. *v.* Johnson, 133 Pa. 293, 19 Atl. 402.

[7] C. *v.* Briggs, 7 Pick. 177.

[8] S. *v.* Moxley, 115 Mo. 644, 22 S. W. 575; Ferrell *v.* S., 2 Lea 25.

[9] C. *v.* Tuck, 20 Pick. 356.

[10] S. *v.* Bean, 77 Me. 486.

But part of an indictment cannot be *nol. prossed* if the result would be a prosecution for a different crime from that found by the grand jury.[1]

When a *nolle prosequi* is entered it is impossible, according to the better opinion, afterwards to renew proceedings on the same indictment.[2]

A *nolle prosequi* cannot be entered by the court.[3] Under ancient practice it could be entered only by the Attorney-General, but at present any official prosecuting attorney has power to enter it, at least by leave of court.[4]

QUASHING.

§ 305. **A motion to quash the indictment was at common law addressed to the discretion of the court.** Unless the indictment was obviously and irretrievably insufficient or illegally found, the court would overrule a motion to quash, and leave the defendant to demur, to plead, or to move in arrest of judgment.[5] Where, however, the indictment is undoubtedly defective it should be quashed,[6] unless it is amendable, in which case it should never be quashed.[7]

The motion to quash will not be entertained unless it is seasonably made. It will not usually be entertained after the defendant has pleaded, whether the

[1] C. *v.* Dunster, 145 Mass. 101, 13 N. E. 350.

[2] R. *v.* Allen, 1 B. & S. 850; Kistler *v.* S., 64 Ind. 371; Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728.

[3] See an amusing anecdote on this point, 1 Hill 405, *n.*

[4] P. *v.* McLeod, 1 Hill 377, 405.

[5] R. *v.* Edwards, 8 Mod. 320; Logan *v.* U. S., 144 U. S. 263, 282; S. *v.* Proctor (N. J.), 26 Atl. 804.

[6] P. *v.* Eckford, 7 Cow. 535.

[7] C. *v.* Williams, 149 Pa. 54, 24 Atl. 158.

ground of the motion is irregularity in the indictment itself or in finding it.[1] But it is still within the power of the court to quash an indictment after plea, and in a clear case of lack of jurisdiction it should be done.[2]

It is sometimes provided that the defendant may have a defective indictment quashed, on motion, as a matter of right,[3] the defect being specifically pointed out in the motion.[4]

In the case of a complaint which has not been legally served, the proper motion is to dismiss, not to quash. This motion, like the motion to quash, must be made before pleading.[5]

[1] Epps *v.* S., 102 Ind. 539, 1 N. E. 491; P. *v.* Drennan, 86 Mich. 445, 49 N. W. 215.

[2] R. *v.* Heane, 4 B. & S. 947.

[3] C. *v.* Alden, 143 Mass. 113, 9 N. E. 15.

[4] C. *v.* Lane, 157 Mass. 462, 32 N. E. 655.

[5] C. *v.* Gregory, 7 Gray 498; S. *v.* Sherman, 16 R. I. 631, 18 Atl. 1040.

CHAPTER XXXIII.

THE VERDICT.

§ 306. AFTER agreeing upon a verdict, the jury is to return and report the verdict in open court. This, though part of the trial, is so far a routine act that it may be performed on Sunday.[1] The verdict may be general or special. A general verdict is the simple finding "guilty" or "not guilty" on the issue. If the jury find the prisoner not guilty they have no right to add anything to their verdict.[2] They may, however, find a special verdict: that is, they may find the truth of certain recited facts, leaving the court upon the facts to pronounce the defendant guilty or not guilty.[3] The special verdict must state all facts necessary to cause the defendant to be acquitted or punished, including the venue, for on a special verdict the court can infer nothing.[4] If a special verdict is imperfect, there must be a new trial.[5]

The verdict may recite the facts, and then conclude with a general verdict of guilty. In some States a special verdict is not allowed unless it thus includes a general verdict, on the ground that the

[1] Reid *v.* S., 53 Ala. 402; Bales *v.* C. (Ky.), 11 S. W. 470.

[2] The direction to the jury is, "If he is not guilty you will say so, and no more." See, however, where a jury added to a verdict of not guilty, irregularly, a statement of their strong suspicion of the defendant's guilt: Trial of Adelaide Bartlett.

[3] C. *v.* Eichelberger, 119 Pa. 254, 13 Atl. 422.

[4] C. *v.* Call, 21 Pick. 509. [5] C. *v.* Call, 21 Pick. 509.

finding of guilt must be by the jury.[1] If this form of verdict is found, and the facts thus found do not constitute guilt, the verdict is contradictory and bad, and there must be a new trial.[2]

§ 307. **Where there are two counts a general verdict of guilty is a verdict of guilty on each count.**[3] If a separate sentence is imposed on each count, and is invalid as to one count, but good as to the other, the sentence on the former count only will be disturbed;[4] and if one of the counts is bad, the same thing is true.[5] So where the jury convicts on one count and disagrees on the other, defendant may be sentenced on the former;[6] so where it convicts on one and is silent on the other.[7] Where two counts describe differently a single offence, a general verdict is proper, and sentence may be passed on either count.[8]

§ 308. **The verdict must be complete and certain.** Strict technical form is not required in a verdict; the jury are not to be held up to the accuracy of pleaders.[9] Thus if the verdict misnumbers the count on which conviction is had, but there is no possible doubt of the meaning, it is a good verdict.[10]

[1] S. *v.* Moore, 107 N. C. 770, 12 S. E. 249.
[2] P. *v.* Cummings, 117 Cal. 497, 49 Pac. 576.
[3] Ballew *v.* U. S., 160 U. S. 187.
[4] Ballew *v.* U. S., 160 U. S. 187.
[5] Putnam *v.* U. S., 162 U. S. 687.
[6] Selvester *v.* U. S., 170 U. S. 262.
[7] C. *v.* Hackett, 170 Mass. 194, 48 N. E. 1087.
[8] Langford *v.* P., 134 Ill. 444, 25 N. E. 1009; S. *v.* Schmidt, 137 Mo. 266, 38 S. W. 938.
[9] S. *v.* Maloney, 7 N. D. 119, 72 N. W. 927.
[10] Newman *v.* P., 23 Col. 300, 47 Pac. 278; Tandy *v.* S., 94 Wis. 498, 69 N. W. 160.

Where a verdict fixed imprisonment for a certain time in the penitentiary instead of the State prison, as the law provided, it was upheld;[1] and so was the verdict "guilty of manslaughter, not a felony," though manslaughter is felony.[2] Any erroneously added words which are mere surplusage may be rejected, leaving a valid verdict.[3]

The verdict, however, must be certain. Where two are tried jointly, a verdict that "we find the defendant guilty" is void for uncertainty.[4] Where the indictment contains two counts, and the verdict is guilty on one and not guilty on the other, if it is impossible to be guilty on one count and not on the other the verdict will be set aside as inconsistent,[5] but not if both findings could possibly be true.[6]

Where the verdict omits a necessary element, it is void, and there must be a new trial. Thus where a *statute* requires the jury to find specially the degree of a crime, and no degree is found, the verdict is incomplete and erroneous, and the defendant is entitled to a new trial.[7] If, however, there is no such statutory requirement, a general verdict of guilty amounts to a conviction of the highest degree charged

[1] Henderson *v.* S., 165 Ill. 607, 46 N. E. 711; Cross *v.* S., 132 Ind. 65, 31 N. E. 473.

[2] P. *v.* Holmes, 118 Cal. 444, 50 Pac. 675.

[3] P. *v.* Jochinsky, 106 Cal. 638, 39 Pac. 1077; C. *v.* Crowley, 168 Mass. 222, 46 N. E. 626.

[4] S. *v.* Weeks (Or.), 34 Pac. 1095.

[5] Moon *v.* S. (Tex. Cr.), 45 S. W. 806.

[6] C. *v.* Donovan, 170 Mass. 228, 49 N. E. 104.

[7] S. *v.* Jackson, 99 Mo. 60, 12 S. W. 367; Allen *v.* S., 85 Wis. 22, 54 N. W. 999.

in the indictment.[1] A statute requiring the jury to find the degree of a crime does not apply where the indictment for a crime includes the charge of an inferior offence; and though the jury might convict of the inferior offence, a general verdict of guilty is a good conviction of the whole offence.[2]

Similarly, where a statute requires the jury to find the value of property found, a verdict omitting to find the value of the property is erroneous;[3] and it has been held insufficient to return "we estimate the value" at a certain amount.[4] In the absence of a statute requiring a special finding of value, a verdict of guilty amounts to a finding of the value stated in the indictment.[5] In Illinois, a statute required the jury to find whether the defendant was or was not under the age of twenty-one; and it was held, in opposition, it would seem, to the distinction laid down in the preceding cases, that if the age of the defendant was over twenty-one it need not be so stated in the verdict.[6]

§ 309. **An imperfection in the verdict does not render it actually void**; an objection by the defendant is necessary in order to take advantage of the irregularity. Thus where the verdict failed to fix part of the punishment, as was required, the omission of any

[1] Craemer *v.* Washington, 168 U. S. 124; S. *v.* Wiese, 53 Ia. 92, 4 N. W. 827.

[2] St. Clair *v.* U. S., 154 U. S. 134; P. *v.* Perez, 87 Cal. 122, 25 Pac. 262; Love *v.* P., 160 Ill. 501, 43 N. E. 710. *Contra*, in Kansas, where the statute is held to apply. S. *v.* Scarlett, 57 Kan. 252, 45 Pac. 602.

[3] Fisher *v.* S., 52 Neb. 531, 72 N. W. 954.

[4] McCormick *v.* S., 42 Neb. 866, 61 N. W. 99.

[5] S. *v.* Kelliher, 32 Or. 240, 50 Pac. 532.

[6] Sullivan *v.* P., 156 Ill. 94, 40 N. E. 288.

objection by the defendant will be taken as a waiver of the defect, and the verdict will not be disturbed.[1] And if on objection by the defendant the verdict is set aside, the defendant is not entitled to his discharge, but only to a new trial.[2]

Since a verdict can be set aside only on objection, it can never be disturbed on the ground that it is too favorable to the defendant. Thus the defendant cannot complain that he was convicted of a less crime than the indictment charged and the evidence proved, provided the crime for which he was convicted was contained in the indictment; for he is not injured by the error.[3] Nor can a defendant complain of a conviction of the crime charged in the indictment because the evidence showed him to have committed a greater crime which included the crime charged.[4]

§ 310. **At the return of the verdict into court an opportunity is given to investigate the correctness of the return.** At that time it is proper for the clerk to repeat the verdict publicly, and ask if all the jurors agree. Any omission which deprives a juror of the opportunity of dissenting is error.[5] But where all the jury was present, it was held harmless error not to call over the names of the jurors, according to the regular form; an opportunity having been given

[1] May *v.* S., 140 Ind. 88, 39 N. E. 701.

[2] P. *v.* Bannister (Cal.), 34 Pac. 710

[3] S. *v.* Billings, 140 Mo. 193, 41 S. W. 778; Ross *v.* S. (Tex. Cr.), 45 S. W. 808.

[4] C. *v.* Smith, 151 Mass. 491, 24 N. E 677; Farrell *v.* S. (Tex. Cr.), 44 S. W. 512 (but see Conde *v.* S., 35 Tex. App. 98, 34 S. W. 286).

[5] Givens *v.* S., 76 Md. 485, 25 Atl. 689.

for the expression of dissent on the part of any juror.[1] In most jurisdictions it is the right of a defendant in a criminal case when a verdict of guilty is returned to have the jury polled, that is, to have each member of the jury express his acquiescence.[2] At a poll of the jury, an individual juror has no right to do more than express his assent or dissent.[3] The right to poll the jury is waived unless it is asked for at once upon the return of the verdict into court.[4] In a few States a poll of the jury cannot be demanded as of right in a criminal case; the rights of the defendant are protected only by the open repetition of the finding in the presence of the jury, giving an opportunity to any juror to express dissent.[5]

§ 311. **Where the verdict as the jury first returns it is erroneous, it may be corrected on the spot,** either by sending out the jury to correct and return it again,[6] or by having it altered at once under direction of the court, the alteration accepted by the jury in court, and the verdict as thus altered recorded by the clerk as the verdict of the jury.[7] The verdict cannot be corrected in any particular after the separation of the jury.[8]

[1] P. *v.* Rodundo, 44 Cal. 538.

[2] S. *v.* Callahan, 55 Ia. 364, 7 N. W. 603; C *v.* Buccieri, 153 Pa. 535, 26 Atl. 228.

[3] S. *v.* Tomlinson, 7 N. D. 294, 74 N. W. 995.

[4] C. *v.* Schmons, 162 Pa. 326, 29 Atl. 644.

[5] C. *v.* Roby, 12 Pick. 496.

[6] Appeal of Nicely (Pa.), 18 Atl. 737.

[7] Quinn *v.* S., 123 Ind. 59, 23 N. E. 977; C. *v.* Delehan, 148 Mass. 254, 19 N. E. 221; S. *v.* Linney, 52 Mo. 40.

[8] Ellis *v.* S., 27 Tex. App. 190, 11 S. W. 111; Allen *v.* S., 85 Wis. 22, 54 N. W. 999. See C. *v.* Townsend, 5 All. 216.

§ 312. **In some jurisdictions a jury may return a sealed verdict.** That is, upon agreeing upon a verdict during an adjournment of the court they may set down the verdict in writing and seal it up, and they may then separate. At the reassembling of the court they return the sealed verdict and affirm it orally.[1] Even in these States a sealed verdict would probably not be sustained in a capital case. In other jurisdictions a sealed verdict is allowed in prosecutions for misdemeanor, but not in prosecutions for felony.[2] In still other States, in non-capital cases, a sealed verdict may be had with the defendant's consent, but not without it;[3] while in a few States even the consent of the defendant will not make such a verdict good.[4]

Where a sealed verdict is allowed without consent of the defendant, permission to separate after sealing a verdict must be obtained from the court; it may be given in open court, or through the officer in charge of the jury.[5] The jurors may separate as they please. An independent investigation of the facts by one of the jurors, after separation but before the return of the verdict, does not vitiate it.[6]

If a sealed verdict is imperfect, it has been held that the jury upon reassembling after separating can-

[1] Beyerline *v.* S., 147 Ind. 125, 45 N. E. 772; C. *v.* Costello, 128 Mass. 88.

[2] Crim. Code Ill., § 435; S. *v.* McCormick, 84 Me. 566, 24 Atl. 938.

[3] Pounds *v.* U. S., 171 U. S. 35; S. *v.* Fertig, 84 Ia. 79, 50 N. W. 545; S. *v.* Anderson, 41 Minn. 104, 42 N. W. 786.

[4] S. *v.* Mason, 19 Wash. 94, 52 Pac. 525.

[5] C. *v.* Heden, 162 Mass. 521, 39 N. E. 181.

[6] C. *v.* Desmond, 141 Mass. 200, 5 N. E. 856.

not be allowed to correct it;[1] though in a case in Indiana even this was permitted.[2]

A verdict presented to the judge and received by him during an adjournment of the court is like a sealed verdict, and therefore it must be affirmed in open court upon reassembling.[3]

[1] Farley *v.* P., 138 Ill. 97, 27 N. E. 927.
[2] Pehlman *v.* S., 115 Ind. 131, 17 N. E. 270.
[3] Longfellow *v.* S., 10 Neb. 105, 4 N. W. 420.

PART IV.

MATTERS AFTER TRIAL.

CHAPTER XXXIV.

PROCEEDINGS BEFORE SENTENCE.

ARREST OF JUDGMENT.

§ 313. **A motion in arrest of judgment will lie after verdict for fatal error apparent on the record.** The most common cause for a motion in arrest of judgment is the insufficiency of the indictment.[1] If the indictment does not state expressly, or by necessary implication, all facts necessary to constitute an offence, judgment may be arrested after verdict.[2] And since the statutes of jeofails do not apply to indictments, it was held as late as the time of Sir William Blackstone that, even in matters of form, "a defective indictment is not aided by a verdict as defective pleadings in civil cases are."[3] It is now, however, well settled that a judgment will not be arrested for defects of form merely, if all essential facts are alleged expressly, or by necessary implication, in the indictment. An indictment defective in form only is

[1] 4 Bl. Com. 375.

[2] U. S. *v.* Cruikshank, 92 U. S. 542; P. *v.* McKenna, 81 Cal. 158, 22 Pac. 488; C. *v.* Newburyport Bridge, 9 Pick. 142.

[3] 4 Bl. Com. 376.

cured by a verdict.[1] Thus judgment will not be arrested for duplicity,[2] or for mis-spelling in part of the indictment a name which was correctly spelled in another part,[3] or for failing to allege that a name was that of a corporation,[4] or for an insufficient description of the property stolen,[5] or for omitting a formal allegation that the act was done feloniously,[6] or that it was contrary to statute,[7] or that it was not wholly in writing.[8]

§ 314. **A woman who is pregnant at the time of sentence should in a capital case be granted a continuance until the child is born.** The child should not be destroyed for the crime of the mother. According to the English practice, the woman pleads her pregnancy in arrest of judgment after sentence.[9] In the one case which appears to have been reported in this country, pregnancy was pleaded before sentence.[10] Upon the plea being entered, the fact is tried by a jury of matrons; and if they find that pregnancy exists, execution or sentence (as the practice may be) is stayed until after delivery of the child.

§ 315. **Benefit of clergy, while it was allowed, could be**

[1] R. *v.* Goldsmith, L. R. 2 C. C. 74; P. *v.* Donaldson, 70 Cal. 116, 11 Pac. 681; P. *v.* Smith, 94 Mich. 644, 54 N. W. 487; S. *v.* Burns, 99 Mo. 471, 12 S. W. 801.

[2] Durland *v.* U. S., 161 U. S. 306; Naanes *v.* S., 143 Ind. 299, 42 N. E. 609; C. *v.* Tuck, 20 Pick. 356 (*semble*).

[3] Herron *v.* S., 93 Ga. 554, 19 S. E. 243.

[4] Laycock *v.* S., 136 Ind. 217, 36 N. E. 137.

[5] S. *v.* Anderson, 42 La. Ann. 590, 7 So. 687.

[6] P. *v.* Lopez, 90 Cal. 569, 27 Pac. 427.

[7] P. *v.* Taylor, 119 Cal. 113, 51 Pac. 37.

[8] S. *v.* Bildstein, 44 La. Ann. 778, 11 So. 37.

[9] R. *v.* Wycherley, 8 C. & P. 262.

[10] S. *v.* Arden, 1 Bay 487.

claimed before sentence was imposed. This curious procedure, by which the extreme rigor of the old penal law was mitigated,[1] was until after Independence in force in this country;[2] but it has long since been abolished.

SETTING ASIDE THE VERDICT.

§ 316. **The defendant has a right to apply to the court in which he was tried to have the conviction set aside on the ground that it was unsupported by evidence.**[3] The action of the trial court in overruling such a motion cannot be reviewed at all in some jurisdictions;[4] in others, only in the very clearest case.[5] In California, it seems that in a clear case even the action of the trial court in granting a new trial will be reviewed.[6] A mere difference of opinion between court and jury will not justify setting aside the verdict; the trial court must be able to say that the verdict was clearly wrong.[7]

If the court finds a verdict erroneous it must set it aside and award a new trial; it is not within the power of the court to alter the verdict, as to change to conviction for a less degree,[8] or to enter a verdict of not guilty.[9]

[1] 2 Hawk. P. C. ch. 33, sect. 1; 4 Bl. Com. 366.

[2] S. *v.* Sutcliffe, 4 Strobh. 372.

[3] Ohms *v.* S., 49 Wis. 415, 5 N. W. 827.

[4] Clune *v.* U. S., 159 U. S. 590; Moore *v.* U. S., 150 U. S. 57; C. *v.* Ruisseau, 140 Mass. 363, 5 N. E. 166; S. *v.* Symes, 17 Wash. 596, 50 Pac. 487.

[5] Graham *v.* P., 115 Ill. 566, 4 N. E. 790.

[6] P. *v.* Flood, 102 Cal. 330, 36 Pac. 663.

[7] Fisk *v.* S., 9 Neb. 62, 2 N. W. 381.

[8] S. *v.* Symes, 17 Wash. 596, 50 Pac. 487.

[9] S. *v.* Curtis, 6 Ire. 247.

§ 317. The verdict may be set aside by the trial court and a new trial granted because of newly discovered evidence. For this purpose affidavits must be presented by the defendant making out a sufficient case.[1]

In order to obtain a new trial on this ground, the defendant must fulfil certain definite requirements. 1. He must show that the evidence has been discovered since the trial;[2] and therefore if he went to trial knowing that his witness was not present, he cannot have a new trial because of the absence of the witness.[3] 2. He must show that there was no lack of diligence in failing to find or obtain the evidence before the trial.[4] 3. He must show that the evidence is material,[5] indicating how it is so.[6] 4. He must show that it might probably influence the verdict,[7] as that it is not probably untrue.[8] Therefore the new evidence must be more than merely cumulative, since merely cumulative evidence would not probably change the result.[9] If, however, though cumulative, the evidence might well influence the verdict, it might be

[1] P. *v.* Stanford, 64 Cal. 27, 28 Pac. 106; P. *v.* Hamilton, 76 Mich. 212, 42 N. W. 1131; Read *v.* C., 22 Grat. 924; S. *v.* Townsend, 7 Wash. 462, 35 Pac. 367. *Contra*, S. *v.* Graff, 97 Ia. 568, 66 N. W. 779.

[2] P. *v.* Kloss, 115 Cal. 567, 47 Pac. 459; Isaacs *v.* P., 118 Ill. 538, 8 N. E. 821; S. *v.* Marcus, 44 La. Ann. 978, 11 So. 576.

[3] Spahn *v.* P., 137 Ill. 538, 27 N. E. 688.

[4] Nesbit *v.* P., 19 Col. 441, 36 Pac. 221; Lilly *v.* P., 148 Ill. 467, 36 N. E. 95.

[5] S. *v.* Beardsley, 43 Kan. 641, 23 Pac. 1070; Henderson *v.* S. (Tex. Cr.), 38 S. W. 605.

[6] Russell *v.* S. (Ind.), 40 N. E. 666.

[7] Jones *v.* S., 48 Ga. 163.

[8] Lawrence *v.* S., 36 Tex. Cr. R. 173, 36 S. W. 90.

[9] P. *v.* McDonnell, 47 Cal. 134; Gilmore *v.* P., 124 Ill. 380, 15 N. E. 758.

sufficient ground for a new trial. Thus in a case where witnesses at the trial were all Indians, and a white witness to the same facts was afterwards discovered, it was held that a new trial might be granted;[1] and where the evidence was directed to proving an *alibi*, since the strength of such a defence lies in the number of witnesses, the discovery of a new witness might be sufficient ground for a new trial.[2]

Evidence which merely impeaches a witness, as by showing statements of his before trial contrary to his evidence at the trial, is usually no ground for a new trial.[3] Therefore a new trial will not be granted on account of testimony by a third party as to statements of a witness, made since the trial, inconsistent with his evidence at the trial; the effect of such testimony being merely impeaching.[4] The same thing has been held even where an affidavit from the witness himself stated the falsity of his former testimony.[5] If, however, this new evidence of the former witness, different from his former testimony, is of such a character as probably to affect the verdict, a new trial should be granted.[6]

[1] S. *v.* Townsend, 7 Wash. 462, 35 Pac. 367.

[2] S. *v.* Stowe, 3 Wash. 206, 28 Pac. 337.

[3] U. S. *v.* Mulholland, 50 Fed. 413; Priest *v.* S. (Tex. Cr.), 34 S. W. 611.

[4] Aholtz *v.* P., 121 Ill. 560, 13 N. E. 524.

[5] P. *v.* Tallmadge, 114 Cal. 427, 46 Pac. 282. See S. *v.* Superior Court, 15 Wash. 339, 46 Pac. 399.

[6] Fletcher *v.* P., 117 Ill. 184, 7 N. E. 80; Dennis *v.* S., 103 Ind. 142, 2 N. E. 349.

CHAPTER XXXV.

THE SENTENCE AND JUDGMENT.

§ 318. **The accused person must be present at the time sentence is passed upon him.** The record must show the fact of his presence, at least in a case where the punishment was by imprisonment or corporal punishment;[1] and in a capital case, at any rate, judgment will be reversed on a writ of error if the record does not show the fact of presence.[2]

Under the older English practice no one could be sentenced in any case in his absence, and no judgment could be rendered in a criminal case by default; therefore when the defendant could not be arrested and brought before the court for sentence, the only process against him was outlawry. It was not possible to render judgment in a criminal case by default. But if no punishment can be inflicted except a fine, there is no impossibility in rendering judgment against one accused of crime in his absence; and this is allowed by the practice of several States. Thus it has been held that a defendant corporation in a criminal case (since it could be punished only by fine) might have judgment pass against it upon default of appearance;[3] and the same practice has been allowed in the

[1] R. *v.* Duke, 1 Salk. 400; S. *v.* Matthews, 20 Mo. 55.

[2] Ball *v.* U. S., 140 U. S. 118; Harris *v.* P., 130 Ill. 457, 22 N. E. 826; French *v.* S., 85 Wis. 400, 55 N. W. 566.

[3] C. *v.* Lehigh Valley R. R., 165 Pa. 162, 30 Atl. 836.

case of an individual defendant, on a prosecution for misdemeanor where the punishment is by a fine only.[1]

§ 319. **Before pronouncing sentence, it is the right of one convicted of felony to be asked if he has anything to say in bar of sentence.** At this time he may move in arrest of judgment, or under the old practice he might crave benefit of clergy.[2] This right originated when one accused of felony was not allowed counsel to defend him, and it is of no practical value when, according to modern practice, the defendant is defended by counsel. It is accordingly held in some States that omission to ask one convicted even of a capital crime whether he has anything to say why sentence of death should not be passed is at most formal error, and does not vitiate the sentence;[3] in other States it is held error which renders the sentence void.[4] In the case of a felony not capital, failure to ask the question is never fatal to the sentence, though to ask it is the usual course;[5] and in the case of a misdemeanor it has never been even formally necessary to ask the question.[6]

§ 320. **The sentence imposing the punishment is pronounced by the court.** It fixes the punishment for the offence of which the defendant has been convicted. The time for imposing sentence is within the discre-

[1] Pursifull *v.* C. (Ky.), 47 S. W. 772.

[2] *Ante*, § 315.

[3] Gannon *v.* P., 127 Ill. 507, 21 N. E. 525; Warner *v.* S., 56 N. J. L. 686, 29 Atl. 505.

[4] Dodge *v.* P., 4 Neb. 220; C. *v.* Preston (Pa.), 41 Atl. 534.

[5] Bressler *v.* P., 117 Ill. 422, 8 N. E. 62; S. *v.* Taylor, 27 La. Ann. 393; P. *v.* Palmer, 105 Mich. 568, 63 N. W. 656.

[6] Turner *v.* U. S., 66 Fed. 289.

tion of the court, which may postpone the imposition.[1] The exact kind and amount of punishment may be prescribed by law; or a certain amount of discretion may be given. In the latter case the punishment was at common law fixed by the court; and, in order to enable the court properly to fix it, an investigation of all pertinent circumstances may be made by the court, and the defendant himself may be questioned.[2] In some States it is provided by statute that punishment shall be assessed by a jury; it is then impossible to impose a sentence where the amount of punishment has not thus been assessed, even where a judgment is rendered on default.[3]

If a sentence is within the limits prescribed by law, an appellate court will not disturb it because of severity,[4] at least in absence of evidence of an abuse of discretion,[5] and then only where all the evidence is on record.[6] The action of the court in determining the sentence cannot be reviewed because it took into account the prisoner's past record,[7] or the pendency of another indictment against him.[8] Where imprisonment for life, or any term of years, is legal, a sentence of imprisonment for ninety-nine years is justified.[9]

[1] P. *v.* Court of Sessions, 141 N. Y. 288, 36 N. E. 386; Cleek *v.* C., 21 Grat. 777.

[2] Tracey *v.* S., 46 Neb. 361, 64 N. W. 1069.

[3] Pursifull *v.* C. (Ky.), 47 S. W. 772.

[4] Shields *v.* S., 149 Ind. 395, 49 N. E. 351; S. *v.* Dooley, 89 Ia. 584, 57 N. W. 414; P. *v.* Kelly, 99 Mich. 82, 57 N. W. 1090.

[5] Weinecke *v.* S., 34 Neb. 14, 51 N. W. 307.

[6] S. *v.* Durston, 52 Ia. 635, 3 N. W. 678.

[7] S. *v.* Wilson, 121 N. C. 650, 28 S. E. 416.

[8] S. *v.* Wise, 32 Or. 280, 50 Pac. 800.

[9] Hickam *v.* P., 137 Ill. 75, 27 N. E. 88.

Where several parties are indicted and convicted jointly, the sentence must be several against each defendant;[1] and where the jury assesses the amount of punishment, it must find a separate penalty against each, or the verdict is bad.[2] Each party may receive the full punishment.[3]

§ 321. **If a sentence is void, the defendant may be resentenced.** Whether the sentence itself is illegal, or the error lay in some irregularity of procedure at the time of imposing sentence, the defendant cannot, because of the error, secure a new trial, and *a fortiori* he is not entitled to a discharge. The verdict is still valid; the case will be sent back for a new sentence upon the verdict.[4] Where the only objection to a sentence is that it imposes a longer imprisonment, or a greater fine, than is authorized by law, the sentence is not altogether void, but is bad for the excess only. If the excessive part of the sentence is separable, it may be ordered stricken out of the record as void, the rest of the sentence remaining in force.[5] Otherwise, the defendant is entitled to no relief until the legal amount of imprisonment has been suffered, or the legal amount of fine has been paid; he is then enti-

[1] Turner *v.* U. S., 66 Fed. 280.

[2] Medis *v.* S., 27 Tex. App. 194, 11 S. W. 112.

[3] P. *v.* Sweetser, 1 Dak. 308, 46 N. W. 452.

[4] *In re* Bonner, 151 U. S. 242; U. S. *v.* Harman, 68 Fed. 472; Henderson *v.* P., 165 Ill. 607, 46 N. E. 711; McCue *v.* C., 78 Pa. 185. In a few jurisdictions a different view was at one time held. Sumner *v.* C., 3 Cush. 521; P. *v.* Taylor, 3 Den. 91. This has, however, been changed by statute. Mass. Pub. Stat. c. 187, § 13; N. Y. Co. Crim. Pro. § 543.

[5] Lowrey *v.* Hogue, 85 Cal. 600, 24 Pac. 995; Taff *v.* S., 39 Conn. 82.

tled to his discharge, and may obtain it if necessary by a writ of *habeas corpus*.[1]

Where the defendant has already served part of an erroneous sentence, it was in one case held impossible to sentence him again.[2] In that case, however, the defendant, before applying for a discharge, had already substantially undergone as severe a punishment as could legally be inflicted; and in such a case the defendant ought obviously to be discharged.[3] Where, however, this is not the case, it would seem clear that the defendant, by applying to the court for relief, asks for a legal sentence, and thereby waives objection to a resentence. At any rate, the incidental imprisonment, pending the execution of sentence (for instance, sentence of death), is not part of the punishment; and in spite of such incidental imprisonment, a void sentence may be reimposed.[4]

Where the period of imprisonment fixed by the statute is less than the minimum imposed by law, it is in some jurisdictions held to be error of which the defendant may take advantage.[5] But the better view is that, since the defendant is not harmed by the error, he cannot be heard to complain of it.[6]

§ 322. **One who is already under sentence for a crime**

[1] U. S. *v.* Pridgeon, 153 U. S. 48; P. *v.* Harrington, 75 Mich. 112, 42 N. W. 680; *In re* Taylor, 7 S. D. 382, 64 N. W. 253.

[2] *Ex parte* Lange, 18 Wall. 163.

[3] Rhea *v.* U. S., 6 Ok. 249, 50 Pac. 992.

[4] McGinn *v.* S., 46 Neb. 427, 65 N. W. 46; P. *v.* Trezza, 128 N. Y. 529, 28 N. E. 533.

[5] Harman *v.* U. S., 50 Fed. 921; Taf[illegible] *v.* S., 39 Conn. 82.

[6] Harmison *v.* Lewistown, 153 Ill. 313, 38 N. E. 628; Nichols *v.* S., 127 Ind. 406, 26 N. E. 839; P. *v.* Burridge, 99 Mich. 343, 58 N. W. 319.

may be tried and sentenced for another crime;[1] as where he escapes from the imprisonment imposed by the first sentence, and while at large commits another crime.[2]

§ 323. **Where a defendant is found guilty on several counts of an indictment, he may be sentenced on each count,** if there is nothing to indicate that the several counts were all descriptions of the same offence.[3] In such a case the sentences cannot be united into a single sentence, at least where imprisonment is imposed; the defendant should be separately sentenced on each count.[4] If, however, the single sentence is no greater than could be imposed on either count separately, it may stand as a sentence upon a single count.[5] And where the punishment is a fine only, the defendant cannot complain of a single sentence as irregular, since the only possible effect of the irregularity is to save him the costs of more than one judgment.[6]

§ 324. **Where two sentences to imprisonment are imposed upon the same individual simultaneously, or one pending the execution of the other, it is proper and necessary to make them cumulative** by providing that one sentence shall begin upon the expiration of the other.[7] This should be provided in the sentence; but it has

[1] *Ex parte* Clark, 85 Cal. 203, 24 Pac. 726.

[2] P. *v.* Flynn, 7 Ut. 378, 26 Pac. 1114.

[3] Hans *v.* S., 50 Neb. 150, 69 N. W. 838; C. *v.* Birdsall, 69 Pa. 482.

[4] S. *v.* Skinner, 34 Kan. 256, 8 Pac. 420; Burrell *v.* S., 25 Neb. 581, 41 N. W. 399.

[5] Stephens *v.* S., 53 N. J. L. 245, 21 Atl. 1038.

[6] Mitchell *v.* C. (Va.), 20 S. E. 892.

[7] Castro *v.* R., 6 App. Cas. 229; *Ex parte* Dalton, 49 Cal. 463; Johnson *v.* P., 83 Ill. 431; Dolan's Case, 101 Mass. 219. *Contra*, P. *v.* Liscomb, 60 N. Y. 559.

been held that even if it is not expressly so provided, two sentences against one defendant pronounced on the same day by the same court shall be regarded as cumulative.[1]

The sentence should be made to begin upon the expiration of the former sentence; it then begins at once upon the premature termination of the former sentence by pardon, reversal on error, or allowance for good behavior.[2] In Pennsylvania, however, an order of court seems to be regarded as necessary in such a case for the commencing of the second sentence.[3]

§ 325. **The terms of the sentence are embodied in the formal judgment,** which becomes part of the record. The judgment must state the nature of the offence, and must recite the conviction and the sentence imposed. If it contains these necessary elements, the judgment is not vitiated by informalities of language,[4] or by surplusage.[5] The court retains power to arrest or modify its judgments before execution; where, however, the sentence has been partly executed, it is usually held that the power of the court to modify its judgment no longer exists.[6]

§ 326. **Cruel and unusual punishments are forbidden**

[1] Meir *v.* McMillan, 51 Ia. 240, 1 N. W. 525; *Ex parte* Durbin, 102 Mo. 100, 14 S. W. 821. *Contra*, *Ex parte* Hunt, 28 Tex. App. 361, 13 S. W. 145.

[2] Blitz *v.* U. S., 153 U. S. 308; Kite *v.* C., 11 Met. 581.

[3] Mills *v.* C., 13 Pa. 631.

[4] White *v.* U. S., 164 U. S. 100.

[5] P. *v.* Wright, 89 Mich. 70, 50 N. W. 792.

[6] Bradford *v.* P., 22 Col. 157, 43 Pac. 1013; P. *v.* Meservey, 76 Mich. 223, 42 N. W. 1133; *In re* Jones, 35 Neb. 499, 53 N. W. 468. *Contra*, S. *v.* Butler, 72 Md. 98, 18 Atl. 1105.

by the Constitution of the United States and by those of most States. The provision of the federal constitution does not apply to punishment by the States, but only to punishment by the federal courts.[1] This provision may prevent the court from imposing an unduly long term of imprisonment, but it does not prevent the fixing of any term, however long, by statute;[2] therefore, where connection with a girl under a certain age, with her consent, was by statute punished very severely, as rape, the punishment could not be held unconstitutional.[3] It has been intimated that if the statutory term was out of all reason, the court might pronounce the statute unconstitutional.[4] It has been claimed that an unusual method of inflicting a usual punishment would be unconstitutional; it has, however, been held that a statute which provides for executing the death penalty by electricity is not unconstitutional.[5]

[1] C. *v.* Murphy, 165 Mass. 66, 42 N. E. 504.

[2] Sturtevant *v.* C., 158 Mass. 598, 33 N. E. 648; P. *v.* Whitney, 105 Mich. 622, 63 N. W. 765.

[3] C. *v.* Murphy, 165 Mass. 66, 42 N. E. 504.

[4] P. *v.* Whitney, 105 Mich. 622, 63 N. W. 765.

[5] P. *v.* Durston, 119 N. Y. 569, 24 N. E. 6.

CHAPTER XXXVI.

EXECUTION OF SENTENCE.

§ 827. The time of execution of the sentence is fixed either by the law or by the terms of the sentence. If the sentence is to imprisonment or the payment of a fine, its execution begins at once, as a matter of law; it is not within the power of the court (except in case of a cumulative sentence) to order imprisonment to begin in the future, as, for instance, after two years, or at such time as the court or the prosecuting attorney may determine.[1] In case of a sentence to capital punishment, the time for execution is fixed by the court at the time of sentence. The fixing of the time is, however, not part of the sentence; and the sentence remains in force though it is not executed at the time fixed. Thus if during an unsuccessful appeal the day set for the execution has passed, a new day may be set.[2] This is not a sentencing anew, and therefore it may be done though the criminal jurisdiction of the court has meanwhile been abolished,[3] or the punishment for the crime altered or even repealed altogether.[4]

[1] *In re* Strickler, 51 Kan. 700, 33 Pac. 620; Lockhart *v.* S., 29 Tex. App. 35, 13 S. W. 1012.

[2] *In re* Cross, 146 U. S. 271.

[3] Nicholas *v.* C., 91 Va. 813, 22 S. E. 507.

[4] S. *v.* Addington, 2 Bail. 516.

Nor need the party be present when a new time is set for execution.[1]

§ 328. **The court has no power in the ordinary case to stay execution of a sentence already imposed.** Such an act is a reprieve, and is the function of the pardoning power.[2] The court, however, may stay execution pending further proceedings in court, as, for instance, pending an appeal, or the prosecution of a writ of error.[3] An appeal from a State court to the Supreme Court of the United States necessarily stays execution pending the appeal.[4]

In Massachusetts it is provided by statute that where exceptions are deemed frivolous by the presiding judge execution shall not be stayed;[5] and in California they cannot be stayed unless a certificate of probable cause is filed.[6]

IMPRISONMENT.

§ 329. **The time of imprisonment is to be computed according to the time defendant was actually in custody,** excluding time he was at liberty illegally, on an escape.[7] It has been held, however, unconstitutional to provide by statute for excluding time during which

[1] Schwab *v.* Berggren, 143 U. S. 442. See Costley *v.* C., 118 Mass. 1, 34.

[2] *In re* Webb, 89 Wis. 354, 62 N. W. 177. See Pointer *v.* U. S., 151 U. S. 396, where it was held that such a suspension of sentence, whether erroneous or not, did not harm the defendant.

[3] Parker *v.* S., 135 Ind. 534, 35 N. E. 179; S. *v.* Hayward, 62 Minn. 114, 64 N. W. 90; S. *v.* Grottkau, 73 Wis. 589, 41 N. W. 80, 1063.

[4] P. *v.* Durrant, 119 Cal. 54, 50 Pac. 1070.

[5] C. *v.* Meserve, 156 Mass. 61, 30 N. E. 166.

[6] P. *v.* McNulty, 95 Cal. 594, 30 Pac. 963.

[7] Dolan's Case, 101 Mass. 219; Cleek *v.* C., 21 Grat. 777.

the prisoner was in solitary confinement by way of punishment for infractions of prison discipline.[1]

The term of imprisonment begins from the day when sentence is imposed, and not from the day when the prisoner arrives at the place of final imprisonment.[2] Where there has been a stay of execution pending an appeal, the sentence, upon affirmance, takes effect from the date of affirmance.[3]

The time set for imprisonment is to be computed without deduction for time during which defendant was imprisoned on sentence (afterwards reversed) given at a former trial. That imprisonment may have been considered by the court or jury in determining the amount of the present sentence, but after the term is fixed the former imprisonment can have no influence on it.[4] So where an appeal is dismissed and judgment ordered on a verdict fixing a term of imprisonment, the full term must be served, without deduction for time in prison pending the appeal.[5]

By a common statute, an allowance is made to a prisoner for good behavior, certain time being deducted from his sentence for that reason. This is constitutional.[6]

An indeterminate sentence, by which a defendant may be sentenced to a term between a certain maxi-

[1] Gross *v.* Rice, 71 Me. 241.

[2] P. *v.* Kelley, 79 Mich. 320, 44 N. W. 615; *In re* Fuller, 34 Neb. 581, 52 N. W. 577.

[3] S. *v.* Grottkau, 73 Wis. 589, 41 N. W. 80.

[4] Baker *v.* S., 88 Wis. 140, 59 N. W. 570.

[5] Harris *v.* P., 138 Ill. 63, 27 N. E. 706.

[6] *Ex parte* Wadleigh, 82 Cal. 518, 23 Pac. 190; Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047. See *In re* Hall, 34 Neb. 206, 51 N. W. 750; S. *v.* Patterson (N. J.), 22 Atl. 802.

mum and minimum has in some States been held constitutional.[1] In Michigan it has been held unconstitutional; but it is a good sentence for the minimum term.[2]

§ 330. **The place of imprisonment may be anywhere the court chooses,** even, it would seem, outside the jurisdiction, if it is so provided by statute.[3] In the case of prosecutions in the Federal courts, it is provided that imprisonment may be in the prisons of any State where the sentence is for more than a year, but not where the term of imprisonment is less than a year.[4] The sentence is subject to the provisions of law; and when a statute provides for the transfer of prisoners from one prison to another, that may legally be done.[5] But the place cannot be changed by the court after the sentence has taken effect.[6]

[1] P. *v.* Illinois State Reformatory, 148 Ill. 413, 36 N. E. 78; Miller *v.* S., 149 Ind. 607, 49 N. E. 894.

[2] P. *v.* Cummings, 88 Mich. 249, 50 N. W. 310.

[3] McKinney *v.* S., 3 Wyo. 719, 30 Pac. 293.

[4] *In re* Mills, 135 U. S. 263.

[5] Rich *v.* Chamberlain, 107 Mich. 381, 65 N. W. 235.

[6] U. S. *v.* Greenwald, 64 Fed. 6.

CHAPTER XXXVII.

APPEAL AND ERROR.

§ 331. A defendant after sentence may bring a writ of error for an error apparent on the record, or may by proper proceedings apply for a new trial for error of law committed in the course of the trial. In England a defendant is entitled to a writ of error alone; for error not apparent on the record he is entitled to no redress. In this country, however, it is held to be his right to have a new trial for any error, whether or not of record, that has prejudiced him.[1] He can, however, complain in an appellate court only of a final judgment against him; an appeal will not lie from an interlocutory order, as the overruling of a demurrer, and an order that defendant plead over.[2] So no appeal will lie from the refusal of the trial court to discharge the defendant after a disagreement of the jury.[3] A judgment will not be reversed by default; though the State does not appear, it is still necessary for the defendant to show his error.[4] If pending appeal the law on which conviction was had is repealed, the judgment cannot be enforced.[5]

[1] C. *v.* Green, 17 Mass. 515.

[2] Erganbright *v.* S., 148 Ind. 180, 47 N. E. 464; S. *v.* Abrisch, 42 Minn. 202, 43 N. W. 1115.

[3] Green *v.* S., 10 Neb. 102, 4 N. W. 422.

[4] Barron *v.* P., 1 Barb. 136.

[5] Spears *v.* Modoc County, 101 Cal. 303, 35 Pac. 869; Monroe *v.* S., 8 Tex. App. 343.

§ 332. **A conviction may be reversed on appeal for insufficiency of the evidence to sustain a conviction.** If the appellate court is asked to reverse a conviction for this reason (as on exceptions to a refusal of the trial court to rule that the evidence was insufficient to convict), it cannot do so if there was any evidence on behalf of the prosecution which, if believed, would justify a conviction.[1] This is true even where the issue was tried by court without jury.[2] But when there is not sufficient evidence introduced to justify a conviction, even if uncontradicted, the appellate court, on proper application, will grant a new trial.[3] And in Iowa it is held that an appellate court will grant a new trial more readily in criminal than in civil cases, and will set aside a verdict, though supported by some evidence, where it is against the clear weight of evidence.[4]

§ 333. **In order to reverse a conviction, the appellate court must find in the record the reason for reversal.** Therefore a conviction will not be reversed for any error not made the subject of a seasonable objection, and thus brought into the record. The error cannot be pointed out for the first time in the appellate court.[5] If the error was seasonably objected to, though the

[1] Humes *v.* U. S., 170 U. S. 210; Deal *v.* S., 140 Ind. 354, 39 N. E. 930; C. *v.* Blankinship, 165 Mass. 40, 42 N. E. 115; Read *v.* C., 22 Grat. 924.

[2] S. *v.* Barr, 54 Kan. 230, 38 Pac. 289; Lamb *v.* S., 41 Neb. 356, 59 N. W. 895; S. *v.* Denoon, 34 W. Va. 139, 11 S. E. 1003.

[3] S. *v.* O'Hara, 17 Wash. 525, 50 Pac. 477.

[4] S. *v.* Wise, 83 Ia. 596, 50 N. W. 59.

[5] Lewis *v.* U. S., 146 U. S. 370; Welsh *v.* S., 96 Ala. 92, 11 So. 450; Barnard *v.* S., 88 Wis. 656, 60 N. W. 1058. *Contra*, in Iowa, S. *v.* Nine, 105 Ia. 131, 74 N. W. 945.

objection was not in proper form, it is sufficient.[1] In New York, however, it is held that a conviction of a capital offence may be reversed for errors which may substantially have prejudiced the defence, even if no objection was made at the time.[2] On the same general principle, a conviction will not be reversed for error in the admission of testimony, if the testimony admitted is not shown on the record to the appellate court.[3] If, however, the record is erroneous, it may be amended so as to show an error that was actually committed.[4]

§ 334. **A conviction will not be reversed at request of the defendant for an error which did not harm him,** as for an erroneous instruction which could not influence the result,[5] or for error in the admission of evidence that could not affect the verdict,[6] or for error in connection with a charge of which defendant was acquitted, conviction being on a second charge.[7] Therefore a defendant cannot appeal from an order dismissing prosecution.[8] So the defendant cannot complain that on an indictment for a serious offence, and conviction of a less offence contained in it, the evidence, if believed at all, proves him guilty of the

[1] S. *v.* Decker, 52 Kan. 193, 34 Pac. 780.

[2] P. *v.* Hoch, 150 N. Y. 291, 44 N. E. 976; P. *v.* Barberi, 149 N. Y. 256, 43 N. E. 635.

[3] Townsend *v.* S., 132 Ind. 315, 31 N. E. 797; C. *v.* Brown, 150 Mass. 334, 23 N. E. 98.

[4] S. *v.* Libby, 85 Me. 169, 26 Atl. 1015.

[5] Campbell *v.* S., 150 Ind. 74, 49 N. E. 905; S. *v.* Witherow, 15 Wash. 562, 46 Pac. 1035.

[6] S. *v.* Viers, 82 Ia. 397, 48 N. W. 732; Ballew *v.* S., 36 Tex. 98.

[7] C. *v.* Billings, 167 Mass. 283, 45 N. E. 910; P. *v.* Knapp, 26 Mich. 112.

[8] P. *v.* Stokes, 102 Cal. 501, 36 Pac. 834.

whole offence. The error, if any, is in his favor.[1] It must clearly appear that the error is harmless; if this is doubtful, a new trial will be granted.[2]

In the Supreme Court of the United States, however, a different rule prevails; and if an error of law is shown, objected to seasonably by defendant, a new trial will be granted, though the error could not have harmed defendant. Thus where the judge at the trial erroneously instructed the jury that the age of full criminal responsibility is eleven, the conviction was reversed, though the defendant was in fact over fourteen, and therefore responsible;[3] and where a statement of the defendant was erroneously admitted, not being voluntary, a new trial was granted, though it had no tendency to prove him guilty.[4]

§ 335. **No action can be taken in a criminal case on behalf of a defendant who is illegally at liberty through an escape**; he cannot be heard by counsel.[5] It is within the discretion of the court to dismiss at once an appeal or writ of error or motion on behalf of an escaped prisoner, and this is usually done as soon as escape is suggested,[6] though sometimes a time is set for defendant to surrender himself, and proceedings dismissed only after the time thus set is passed.[7] It

[1] P. *v.* Muhlner, 115 Cal. 303, 47 Pac. 128; Polson *v.* S., 137 Ind. 519, 35 N. E. 907; C. *v.* Smith, 151 Mass. 491, 24 N. E. 677. *Contra*, Conde *v.* S., 35 Tex. Cr. R. 98, 34 S. W. 286.

[2] Kirby *v.* P., 123 Ill. 436, 15 N. E. 33.

[3] Allen *v.* U. S., 150 U. S. 551 (*semble*).

[4] Bram *v.* U. S., 168 U. S. 532.

[5] R. *v.* Caudwell, 17 Q. B. 503; Anon., 31 Me. 592.

[6] C. *v.* Andrews, 97 Mass. 543.

[7] P. *v.* Redinger, 55 Cal. 290; S. *v.* Carter, 98 Mo. 431, 11 S. W. 979; Sherman *v.* C., 14 Grat. 677.

would seem that this rule does not apply in the case of misdemeanors, where a defendant may appear by counsel; nor will a dismissal be granted in any case when asked after defendant has voluntarily returned to custody.[1]

§ 336. **The complete execution of sentence pending appeal will not prevent the hearing of the appeal,**[2] provided the execution of the sentence — for instance, payment of the fine — was not voluntary.[3] But where the defendant after judgment made an arrangement for a stay of execution, agreeing on his part to abide by the judgment, it was held that he had waived his right to appeal.[4] And so where defendant voluntarily pays his fine, he cannot for the first time after such payment object and appeal.[5]

§ 337. **If the defendant died pending a writ of error, it was possible at common law for the writ to be prosecuted by his heirs** or executor in order to remove corruption of blood and forfeiture.[6] Since corruption of blood no longer follows conviction, it is held in this country that proceedings to reverse a conviction abate upon the death of the convict.[7] And therefore an appeal from sentence of death will be dismissed if the sentence has been executed.[8]

[1] S. *v.* Colby, 92 Ia. 463, 61 N. W. 187.

[2] C. *v.* Fleckner, 167 Mass. 13, 44 N. E. 1053; Roby *v.* S., 96 Wis. 667, 71 N. W. 1046.

[3] O'Hara *v.* P., 41 Mich. 623, 3 N. W. 161.

[4] S. *v.* Sawyer, 43 Minn. 202, 45 N. W. 155.

[5] P. *v.* Leavitt, 41 Mich. 470, 2 N. W. 812.

[6] Marsh's Case, Cro. Eliz. 225.

[7] O'Sullivan *v.* P., 144 Ill. 604, 32 N. E. 192; S. *v.* Martin, 30 Or. 108, 47 Pac. 196; Hardin *v.* S. (Tex. Cr.), 36 S. W. 82.

[8] S. *v.* Brown, 1 Mo. App. 449.

§ 338. **No process in the nature of appeal or error will ordinarily lie on behalf of the State.** If there has been an acquittal on the merits, though on account of an error in law, the defendant cannot again be tried, since he has the defence of former jeopardy;[1] the State could gain nothing by an appeal, and it is therefore not allowed.[2] In Connecticut, however, where there is no constitutional guarantee against a second jeopardy, a statute has provided for exceptions by the State for errors of law in the course of the trial; and upon such exceptions a judgment of acquittal after a verdict of not guilty may be reversed.[3] And in Ohio exceptions may (by provision of statute) be taken by the State in order to fix the law for the future, though the defendant could not be tried again.[4]

When the discharge of the defendant was upon the decision of an issue of law by the court, as on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment, the prevailing view is that no writ of error or appeal lies in favor of the State.[5] Such an appeal or error when authorized by statute is of course good.[6]

Where an intermediate court has, at the defendant's request, reversed a conviction for error of law,

[1] *Ante*, § 71.

[2] U. S. *v.* Sanges, 144 U. S. 310; C. *v.* Cummings, 3 Cush. 212; C. *v.* Steimling, 156 Pa. 400, 27 Atl. 297.

[3] S. *v.* Lee, 65 Conn. 265, 30 Atl. 1110.

[4] S. *v.* Buechler, 57 Oh. S. 95, 48 N. E. 507.

[5] U. S. *v.* Sanges, 144 U. S. 310; P. *v.* Corning, 2 N. Y. 9; S. *v.* Jones, 7 Ga. 422; S. *v.* Simmons, 49 Oh. S. 305, 31 N. E. 34. *Contra*, S. *v.* Wabash Paper Co. (Ind. App.), 48 N. E. 653; C. *v.* Williams, 149 Pa. 54, 24 Atl. 158.

[6] P. *v.* Lee, 107 Cal. 477, 40 Pac. 754; S. *v.* Clerkin, 58 Conn. 98, 19 Atl. 517; P. *v.* Clark, 7 N. Y. 385.

its action may in turn be reversed, at request of the State, by the higher court;[1] not, however, when the reversal is upon the facts,[2] as upon the question whether the erroneous admission of evidence prejudiced the defendant.[3] It has been held that an unlawful discharge after conviction may be reversed on complaint by the State.[4]

[1] S. *v.* Ruedy, 57 Oh. S. 224, 48 N. E. 944.
[2] P. *v.* Mitchell, 142 N. Y. 639, 36 N. E. 1051.
[3] P. *v.* Dorthy, 156 N. Y. 237, 50 N. E. 800.
[4] Atwood *v.* Atwater, 34 Neb. 402, 51 N. W. 1073.

CHAPTER XXXVIII.

PARDON AND OTHER BARS TO EXECUTION.

§ 339. **A pardon is an act of grace which exempts the recipient from punishment for crime.** It must be accepted by the recipient; and since it is not communicated to the court, but to the individual, it must be brought to the attention of the court by pleading it at the first opportunity, or it will not avail the prisoner.[1] It may be pleaded in bar of the indictment, except in States where a valid pardon cannot be granted before conviction; or it may be pleaded after conviction before judgment;[2] or it may be pleaded after sentence. In the latter case it does not relieve from the obligation to pay costs.[3]

A pardon may be conditional, as upon the criminal leaving the State; if the condition is broken, as by returning during the term of the sentence, the defendant may at once be rearrested and obliged to perform the sentence;[4] or if the pardon is granted before sentence, he may on breach of condition be arrested and sentenced.[5] The commonest form of conditional pardon is the so-called commutation of sentence of death, which is in form a pardon of the

[1] U. S. *v.* Wilson, 7 Pet. 150.
[2] C. *v.* Lockwood, 109 Mass. 323.
[3] Estep *v.* Lacy, 35 Ia. 419.
[4] C. *v.* Haggerty, 4 Brewst. 326.
[5] S. *v.* Fuller, 1 McC. 178.

crime on condition of being imprisoned for life; if this pardon is accepted, the criminal must submit to the imprisonment, or, having broken the condition, be hanged.[1] Another common form is the ticket-of-leave, or pardon on condition of good behavior.[2]

A pardon may be granted even after execution of the sentence; its effect then being to restore civil rights to the pardoned person.[3] To bring about this result, however, the act of the pardoning power must take the form of a pardon. It is not an act of pardon to grant in terms "restoration to citizenship." Such a grant is of no effect.[4] On the other hand, if there is a pardon, the restoration to citizenship necessarily follows; the pardoning power cannot provide that it shall not do so.[5] The effect of a pardon is to expunge the conviction; therefore, a conviction followed by a pardon does not count as a former conviction under the habitual criminal act.[6]

§ 340. **A reprieve, granted by the pardoning power, is a temporary stay of execution of the sentence of death** until a time named in the reprieve. When that time arrives, the sentence of death is to be executed without further process.[7]

§ 341. **If a discontinuance is worked, the defendant must be finally discharged,** as where a magistrate, having power only to continue to a day certain, continues

[1] *Ex parte* Wells, 18 How. 307.

[2] Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047.

[3] Logan *v.* U. S., 144 U. S. 263.

[4] P. *v.* Bowen, 43 Cal. 439.

[5] P. *v.* Pease, 3 Johns. Cas. 333.

[6] S. *v.* Martin, 59 Oh. S. —, 52 N. E. 188; Edwards *v.* C., 78 Va. 39. *Contra*, Mount *v.* C., 2 Duv. 93.

[7] *In re* Buchanan, 146 N. Y. 264, 40 N. E. 883.

for sentence indefinitely.[1] So where in any court there is an indefinite suspension of sentence, and the defendant is discharged from custody, he cannot afterward be arrested and sentenced.[2] But a wrongful discharge of the defendant from imprisonment after sentence and before full performance of the judgment, does not act (as in a civil case) as a full execution. The defendant may be rearrested and obliged to perform the sentence in full.[3] And where the indictment was by agreement with the defendant filed away to be reinstated on his violating his promise not to repeat the offence, it was not a discontinuance; and the defendant, having broken his promise, might be brought to trial upon the indictment.[4]

§ 342. **One who testifies against an accomplice and secures his conviction has no immunity from prosecution** merely because of that fact.[5] Even if this is done under an agreement by the prosecuting attorney, without consent of the court, the agreement does not constitute a legal defence.[6] In the same way an agreement by the prosecuting attorney, that if defendant pleads guilty he shall not be punished, is invalid.[7]

[1] C. *v.* Maloney, 145 Mass. 205, 13 N. E. 482.

[2] P. *v.* Allen, 155 Ill. 61, 39 N. E. 568. *Contra*, P. *v.* Watson, 95 Mo. 411; and see P. *v.* Patrick, 118 Cal. 332, 50 Pac. 425.

[3] McLaughlin *v.* Etchison, 127 Ind. 474, 27 N. E. 152; *In re* Landreth, 55 Kan. 147, 40 Pac. 285.

[4] C. *v.* Bottoms (Ky.), 48 S. W. 974.

[5] The Whiskey Cases, 99 U. S. 594; C. *v.* Plummer, 147 Mass. 601, 18 N. E. 567.

[6] Whitney *v.* S., 53 Neb. 287, 73 N. W. 696. *Contra*, Camron *v.* S., 32 Tex. Cr. R. 180, 22 S. W. 682.

[7] Gray *v.* S., 107 Ind. 177, 8 N. E. 16; S. *v.* Bain, 112 Ind. 335, 14 N. E. 232.

CHAPTER XXXIX.

EX POST FACTO LAWS.

§ 843. **Legislatures are forbidden by most constitutions to pass ex post facto laws.** The general tests for determining whether a law is *ex post facto* are: whether it made criminal and punishable any act that was innocent when committed, or aggravated any crime previously committed, or inflicted a greater punishment than the law annexed to such crime at the time of its commission, or altered the legal rules of evidence in order to convict the offender.[1]

Any increase of punishment is *ex post facto*, as by adding solitary confinement to the punishment provided at the time of the offence,[2] or by extending time in prison before execution.[3] So the substitution of one punishment for another is *ex post facto* as to offences committed before the change.[4] Where, however, the punishment is the same in kind but less in degree, as when the term of imprisonment is shortened, it is not *ex post facto*;[5] and by the better view a change of the punishment, after commission of the

[1] Kring *v.* Missouri, 107 U. S. 221, 228; Duncan *v.* Missouri, 152 U. S. 377.

[2] Medley, Petitioner, 134 U. S. 160. See *In re* Tyson, 13 Col. 482, 22 Pac. 810.

[3] P. *v.* McNulty, 93 Cal. 427, 28 Pac. 816.

[4] Hartung *v.* P., 22 N. Y. 95.

[5] P. *v.* Hayes, 140 N. Y. 484, 35 N. E. 951.

offence, from death to imprisonment, is a mitigation and not *ex post facto*,[1] though in some jurisdictions it is held otherwise.[2]

A law is *ex post facto* if passed after the commission of the crime, though before the happening of the facts to which it applies. Thus a change of law by which one convicted of murder in the second degree and securing a new trial might be convicted of murder in the first, is *ex post facto* as to murders committed before its passage, though the first trial was after its passage.[3]

A mere change in procedure, which does not directly affect substantive rights of the accused, is not obnoxious though made after the offence. Thus a statute changing the qualifications of jurors is not void as to crimes previously committed;[4] nor is one reducing the number of jurors,[5] or making the court instead of the jury judge of the law;[6] nor is one repealing a law which provided for a preliminary examination,[7] or changing the method of prosecution from indictment to information;[8] nor is one which makes a previously ineligible person a competent witness,[9] or allows a change of venue,[10] or prevents a defendant

[1] C. *v.* Wyman, 12 Cush. 237.

[2] Shepherd *v.* P., 25 N. Y. 406.

[3] Kring *v.* Missouri, 107 U. S. 221.

[4] Gibson *v.* Mississippi, 162 U. S. 565.

[5] S. *v.* Ah Jim, 9 Mont. 167, 23 Pac. 76; S. *v.* Carrington, 15 Ut. 480, 50 Pac. 526.

[6] Marion *v.* S., 20 Neb. 233, 29 N. W. 911.

[7] Jones *v.* C., 86 Va. 661, 10 S. E. 1005.

[8] P. *v.* Campbell, 59 Cal. 243; *In re* Wright, 3 Wyo. 478, 27 Pac. 565.

[9] Hopt *v.* Utah, 110 U. S. 574.

[10] P. *v.* McDonald (Wyo.), 42 Pac. 15.

from taking advantage of immaterial variances between indictment and proof.[1]

A statute imposing an increased punishment for a second offence is not *ex post facto* where the second offence is after though the first was before the act;[2] nor is a law which changes the legal place of imprisonment.[3]

§ 344. **It is usual to prevent the difficulty that arises upon a change of the law by a "saving clause,"** by which the new law is not to apply to offences already committed, as to which the old law is left unchanged. This result may be brought about by a general law, to apply to all future changes in the laws for preventing and punishing crimes.[4]

[1] C. *v.* Hall, 97 Mass. 570.

[2] C. *v.* Graves, 155 Mass. 163, 29 N. E. 579; Blackburn *v.* S., 50 Oh. S. 428, 36 N. E. 18.

[3] *In re* Tyson, 13 Col. 482, 22 Pac. 810.

[4] P. *v.* McNulty, 93 Cal. 427, 29 Pac. 61; C. *v.* Sullivan, 150 Mass. 315, 23 N. E. 47.

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